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In the Supreme Court of the United States

OCTOBER TERM, 1976

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

HOME BOX OFFICE, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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HOME BOX OFFICE, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Federal Communications Commission petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A,[1] pp. 1–116) and the special concurring opinion of Judge MacKinnon (App. B, pp. 117–122) have not yet been reported. The orders of the Federal Communications Commission (Apps. C–F, pp. 123–242) are reported at 52 FCC 2d 1, 54 FCC 2d 797, 35 Rad. Reg. (P&F) 2d 767, and 51 FCC 2d 317.

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[1] The appendices to this petition are set forth under separate cover.

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JURISDICTION

The judgment of the court of appeals was entered on March 25, 1977 (App. G. pp. 243–246). A partial stay of mandate was granted by the court of appeals on May 4, 1977 (App. H, pp. 247–250), and this petition for certiorari is being filed within the time allowed by the court. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

(1) Whether it is within the Commission's statutory authority and constitutionally permissible under the First Amendment for the Federal Communications Commission to adopt rules applying the same requirements already governing subscription broadcasting to subscription cablecasting which is voluntarily undertaken by cable systems also carrying broadcast signals.

(2) Whether the requirement of the court of appeals concerning the evidentiary support required for rules necessarily looking to future events constituted an improper application of the standard of review for informal policymaking proceedings in derogation of the Commission's broad discretion to plan in advance of reasonably foreseeable events.

(3) Whether the action of the court of appeals barring all *ex parte* communications in informal rulemaking proceedings unjustifiably infringes upon the distinction between rulemaking and adjudication which is fundamental to modern administrative law.

STATUTES INVOLVED

Sections 1, 2(a), 3(a), 3(b), 307(b) and 326 of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §§ 151, 152(a), 153(b), 307(b), and 326, are set forth in App. I, pp. 251–252.

STATEMENT

This petition seeks review of an opinion (App. A, pp. 1–116) and judgment (App. G, pp. 243–246) setting aside various regulations of the Federal Communications Commission which were designed to prevent the siphoning to pay cable television of certain sports events heretofore broadcast over conventional free television and to promote the development of pay cable as a beneficial supplement to over-the-air television.[2]

The Commission has long been concerned that popular television programs not be lost to the general viewing audience as a result of being siphoned away from free television to pay services available to only a minority. After a seventeen-year inquiry into subscrip-

[2] As used herein, pay cable or subscription cablecasting is the service whereby non-broadcast programming is distributed over cable television systems whose channels are also used to carry broadcast programming, and subscribers are charged an additional program or channel fee beyond the regular monthly fee for the system's broadcast signal carriage service. *First Repart and Order in Dockets 19554 and 18893*, 52 FCC 2d 1, 2 (1974) (App. C, p. 124).

tion television (STV),[3] in which it became apparent that sports events and feature films were in greatest demand among pay subscribers, the Commission, in December 1968, adopted rules restricting the sports events and feature films which STV stations could broadcast in order to prevent siphoning and encourage the development of a service "with a type of programming generally not found in free television." *Fourth Report and Order on Subscription Television,* 15 FCC 2d 466, 556 (1968).

In addition to regulating when a particular sports event or feature film could be shown on STV, the Commission's rules provided that no series type program with interconnected plots or substantially the same cast of principal characters could be shown, that no advertising would be permitted during subscription operations (except for announcements to promote STV programs), and that no more than ninety percent of the total STV broadcasting hours could consist of sports events and feature films combined. 15 FCC 2d at 556–565, 597–598. The Commission's power to authorize STV stations on a permanent basis[4] and the restrictions on STV operations were affirmed in *National Association of Theatre Owners* v. *FCC,* 420 F.2d 194 (D.C. Cir. 1969), *cert. denied,* 397 U.S. 922 (1970) (hereinafter *NATO*).

[3] Subscription television is the service whereby programs are transmitted in scrambled form and can be received in intelligible form by the use of decoders for which subscribers are charged a fee (App. C, p. 124).

[4] A trial STV operation had earlier been affirmed in *Connecticut Committee Against Pay TV* v. *FCC*, 301 F.2d 835 (D.C. Cir.), *cert. denied*, 371 U.S. 816 (1962).

When the Commission first considered whether it needed to regulate the origination of programming over cable systems (as contrasted with retransmission of broadcast signals), it did not focus upon the fact that such services could be accompanied by per-program or per-channel charges. Instead, in adopting a mandatory program origination rule for rule cable systems, the Commission considered and rejected the broader argument that unrestricted program origination over cable channels threatened to produce a siphoning of popular programming away from the broadcast service. *First Report and Order in Docket 18397,* 20 FCC 2d 201, 202–205 (1969). Upon reconsideration, the Commission did direct its attention to pay cablecasting, as distinguished from cablecasting unaccompanied by per-program or per-channel charges, and concluded that pay cablecasting posed the same threat presented by STV, of siphoning programs away from free television in favor of a service limited to those who can pay. In the case of pay cablecasting, unlike STV, there was the additional fact of cable's geographical unavailability in many places, particularly rural areas. Therefore, no distinction between pay cable and STV for purposes of the Commission's basic anti-siphoning policy could be justified, and the anti-siphoning rules already approved for STV were extended to pay cable services over systems which also carried broadcast signals. *Memorandum Opinion and Order in Docket 18397,* 23 FCC 2d 825, 828 (1970) (footnote omitted). This Court upheld the mandatory origination rules without passing upon the anti-

siphoning rules. *United States* v. *Midwest Video Corp.*, 406 U.S. 649, 657 and n.14 (1972).

The instant rulemaking proceeding was initiated in 1972 to consider changes in the anti-siphoning rules. The Commission saw the central issue as "how pay cablecasting can best be regulated to provide a beneficial supplement to over-the-air broadcasting without at the same time undermining the continued operation of that free television service." *Notice of Proposed Rulemaking and Memorandum Opinion and Order in Docket 19554,* 35 FCC 2d 893, 898 (1972).

After nearly three years and the submission of numerous comments and two rounds of oral arguments, the Commission affirmed the determination made in 1970 that it could not permit pay cable to operate unregulated until siphoning began to occur. Instead it opted for taking "preventative measures . . . to avert the potential ill effects of siphoning before they are actually felt," and "when [regulatory action] involves no disruption of existing patterns" (App. C., p. 171). *See* also 23 FCC 2d at 828. Therefore, it continued the basic regulatory approach in effect for STV since 1969 and for pay cable since 1970, whereby the goal was to strike a balance between the objectives of developing pay cable and STV to fulfill their promise of greater viewing diversity, while at the same time avoiding impairment to the general public's interest in continuing to receive popular programs over free television (App. C, pp. 166, 191, 192).

Operating under these guidelines, the Commission determined that some modification of the sports anti-siphoning rules was consistent with the public interest.[5] Previously under the sports rules pay entrepreneurs were not permitted to exhibit games of a sporting event where a "substantial number" of games had been telecast without charge to viewers during specified time periods.[6] 15 FCC 2d at 562, 23 FCC 2d at 828. The Commission revised the rules to limit pay telecasts of specific sports events (such as the baseball World Series or the football Super Bowl) to those which had not been telecast live over free television in the relevant market during any one of the five preceding seasons.[7] With regard to non-specific sports events (such as regular season baseball or football games), the rules were relaxed so as to permit the

[5] This was also the case with the provisions concerning the feature films which could be shown over pay cable. Because the Commission is not arguing before this Court for the retention of the feature film siphoning rules as modified, the discussion above will be confined to the details of the modified sports rules.

[6] The formula for ending the uncertainty brought about by the use of the undefined "substantial number" concept and determining how many non-specific sports events for a given sport in a given year may be shown over pay cable and STV is set forth at App. C, pp. 182, 187, 192, 193–194.

[7] The original anti-siphoning rule for both STV and pay cable allowed pay exhibition of sports events which had not been televised over free television consecutively for the two immediately prior years. The five year rule adopted for pay cable in the instant proceeding had already been adopted for STV in 1972. *Report and Order in Docket 18893*, 34 FCC 2d 271 (1972).

televising of these events during a season on both a free and a pay basis (App. C, pp. 182–187).

The rules limiting pay operations to no more than 90% of their pay offerings to feature films and sports and restricting commercial advertising on pay programs were continued without change. These restrictions were an effective means, the Commission believed, of encouraging pay cable and STV to offer diverse and innovative programming, different from that found on the advertiser supported conventional television medium [8] (App. C, p. 188).

Several parties sought appellate review pursuant to 47 U.S.C. § 402(a). The court of appeals upheld the rules as they apply to subscription television,[9] but set them aside insofar as they govern subscription cablecasting.[10] The court found the pay cable rules to be unlawful on essentially three grounds: (1) the Commission exceeded its jurisdiction in promulgating the pay cable rules because the ends to be achieved were not "long established" in the field of broadcasting, and there is insufficient evidence in the record to support the need for regulation; (2) the rules violate the First Amendment because they restrict free speech

[8] The old rules prohibiting pay cable and STV from showing series-type programming were initially modified and later deleted altogether (App. C, pp. 187–188; App. E, pp. 225–227).

[9] This approval is subject to further review upon completion of additional hearings ordered by the court regarding *ex parte* contacts, discussed further *infra*.

[10] The Commission is herein asking this Court to review all aspects of the court's action setting aside the pay cable rules, except that review is not being sought of the action with respect to subsection (a) of the rules (App. C, pp. 192–193).

unnecessarily since cable is not limited by a scarcity of spectrum space like broadcasting and, moreover, the restraints appear greater than necessary to further any legitimate government interest; and (3) the informal rulemaking procedures utilized to adopt the rules violated fundamental notions of fairness and due process, and precluded court access to the "full administrative record" necessary for judicial review by permitting frequent *ex parte* contacts during the pendency of the rulemaking proceeding.

REASONS FOR GRANTING THE WRIT

The Communications Act of 1934, as amended, charges the Commission "to make available so far as possible, to all the people of the United States a rapid, efficient, Nationwide . . . wire and radio communication service." 47 U.S.C. 151. Achievement of this goal with respect to television communications is substantially impaired by the court's holding that the Commission has no jurisdiction to integrate pay cable into a total television system by requiring that it restrict its service to that which will supplement the service provided by conventional broadcasting. In view of cable television's burgeoning growth and the fact that much of the country has no alternative to conventional television, this restriction on the Commission's authority presents questions of far-reaching legal and practical importance. Closely related to this question is the decision by the court below that the pay cable rules constitute an unlawful restriction on free speech. This holding has created a conflict among circuits concerning the status of cable television systems which

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use broadcast signals under the First Amendment. This Court should resolve this conflict in order to remove further uncertainty concerning the Commission's constitutional as well as its statutory authority.

The decision of the court also raises important issues as to the proper application of the standard of review for informal rulemaking proceedings, and the ability of regulatory agencies to plan in advance of foreseeable events and to act on the basis of their own forecasts and expert judgments even where there is no concrete supporting evidence. In addition, the court's ruling prohibiting the Commission from receiving any *ex parte* contacts during the pendency of an informal rulemaking proceeding erroneously strikes down procedures heretofore considered permissible under the Administrative Procedure Act. This, together with the manner in which the court has applied the standard of review to this rulemaking, severely limits the utility of informal rulemaking proceedings as a device for formulating broad policy judgments. Such a consequence should not be permitted to occur without benefit of this Court's consideration.

I. THE COURT'S HOLDING THAT THE COMMISSION LACKS AUTHORITY TO REGULATE SUBSCRIPTION CABLECASTERS IN THE SAME MANNER AS IT REGULATES SUBSCRIPTION BROADCASTERS IS INCONSISTENT WITH PRIOR SUPREME COURT DECISIONS

This Court has twice had occasion to review the scope of the Commission's authority over cable television operations. *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968); *United States* v. *Midwest Video Corp., supra.* As a result it has been established that the Commission has authority "to regulate CATV with a view not merely to protect but to promote the objectives for which the Commission had been assigned jurisdiction over broadcasting."[11]

The court does not dispute the fact that the Commission has authority to regulate cablecasting, but holds that the Commission lacks jurisdiction to adopt the subscription cablecasting rules here at issue because they do not appear designed to "further the achievement of long-established regulatory goals in the field of television broadcasting."[12] (App. A, p. 40, quoting *Midwest Video,* 406 U.S. at 667–668). The Commission stated its purpose to be "to insure that programs now provided over conventional television are not siphoned away to subscription television,"

[11] *Midwest Video, supra,* 406 U.S. at 667. That the Commission has authority over such cablecasting cannot be questioned. The *Midwest* plurality held specifically that "[t]he devotion of CATV systems to broadcast transmission—together with the interdependencies between that service and cablecasts, and the necessity for unified regulation—plainly suffices to bring cablecasts within the Commission's § 2(a) jurisdiction." *Id.* at 662–63 and n. 21. Even the dissenting justices did not dispute the Commission's authority to "regulate origination of programs;" their disagreement concerned whether this authority included the power "to compel cable systems to originate programs." *Id.* at 680 (dissenting opinion).

[12] It would appear that the "long established goal" test is an unduly restrictive statement of those permissible purposes which can satisfy the "reasonable ancillary" standard. *Southwestern Cable,* 392 U.S. at 178; *Midwest Video,* 406 U.S. at 664. However, it makes little difference at this juncture since the goals of the subscription cablecasting rules satisfy both tests.

(App. C, p. 163), in the belief "that the existing conventional television structure performs a valuable service to the public and that our statutory mandate to act in the public interest requires that we strive to maintain the public's ability to receive the informational and entertainment programming now provided by conventional television at no direct cost." (App. C, p. 165). The court's conclusion that this is not a legitimate goal under the Communications Act is erroneous and inconsistent with the holdings in *Southwestern Cable* and *Midwest Video.*

The Commission's responsibilities include the regulation of cable as necessary to the effective performance of its primary responsibility for maintaining a *nationwide system* of television broadcasting.[13] The Supreme Court's definition of that responsibility has been stated in comprehensive terms:

> The Commission has been charged with broad responsibilities for the orderly development of an appropriate system of local television broadcasting. The significance of its efforts can scarcely be exaggerated, for broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population.[14]

[13] In *Midwest Video*, it was noted that the Commission's "express purpose" in regulating cable television was "to integrate the CATV service into the national television structure in such a way as to promote maximum television service to all people of the United States (secs. 1 and 303(g) of the Act)." 406 U.S. at 665–666, quoting *Second Report and Order*, 2 FCC 2d 725, 745–746 (1966).

[14] *Southwestern Cable*, 392 U.S. at 165.

The Commission's "various responsibilities for the regulation of television broadcasting . . . are considerably more numerous than simply assuring that broadcasting stations operating in the public interest do not go out of business." 406 U.S. at 664. Most pertinent, here, they include the obligation to assure that viewers are provided suitably diversified programming. *National Broadcasting Co.* v. *United States,* 3190. S. 190 (1943); *Midwest Video, supra,* 406 U.S. at 669. Thus, the Commission may concern itself about the "content of the programming offered" over cable, and if it is not satisfied that cable operations continued to broadcast retransmission will provide sufficient diversity it may require cable operators to originate programming. *Midwest Video, supra.*

Another long established goal has been "the preservation of conventional television service and the continued availability of good program material to the free service," [15] primarily because the conventional service is relied upon by so many people for information and entertainment. This goal received recognition and approval in *NATO, supra,* 420 F.2d at 197, where the

[15] *Further Notice of Proposed Rulemaking and Notice of Inquiry in Docket 11279*, 31 F.R. 5 36, 7 RAD. Reg. (P & F) 2d 1501, para. 16 (1966). The Commission's recent *Memorandum Opinion and Order*, 60 FCC 2d 858 (1967), "Changes in the Entertainment Formats of Broadcast Stations," is not relevant here. As the Court recognized (App. A, p. 48), there the Commission stated that it has no authority to dictate entertainment formats. This is quite different from the situation here which, instead of dictating a total format to be broadcast, involves regulations to facilitate the abiilty of the free broadcasting service to continue offering, if it so chooses, popular entertainment programming.

court approved subscription television rules designed to avoid the "possibility that programs, audiences, and talent would be diverted ('siphoned') from free television to STV," because the Commission felt that the public's "tremendous investment . . . in television receivers based on the expectation of free service ought to be protected and the millions of viewers who rely on that free service for free entertainment should be permitted to do so." Clearly, regulations adopted to achieve this objective "preserv[e] and enhanc[e] the integrity of broadcast signals and therefore [are] reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." *Midwest Video,* 406 U.S. at 470. The rules here at issue for pay cable, which parallel the pay broadcasting rules initially upheld in *NATO,* clearly fall within this category, and therefore do not exceed the Commission's authority.[16]

[16] The court vacated the Commission's ninety percent and advertising rules, distinguishing its affirmance of the identical rules in *NATO* on the fact that the latter decision was in the "context of a need to allocate scarce spectrum resources." (App. A, p. 55.) We submit that the Commission's authority to regulate competing video services, with the goal of achieving an integrated nationwide network, provides the necessary jurisdiction for the Commission to require that such specialized services provide a beneficial supplement to what is already available. This being the case, the rules should be upheld since they beneficially increase the diversity available to the public by assuring that "subscription operations provid[e] a different and diverse type of programming from that found on advertiser supported television." (App. C, p. 188).

II. THIS COURT SHOULD RESOLVE A CONFLICT AMONG CIRCUITS CREATED BY THE DECISION BELOW CONCERNING THE STATUS UNDER THE FIRST AMENDMENT OF CABLE TELEVISION SYSTEMS WHICH USE BROADCAST SIGNALS

The court below held that the Commission has broader authority under the First Amendment over broadcast television than it does over cable television systems which use broadcast signals.[17] This conclusion is based upon the absence, in the case of cable television, of the broadcast factors of spectrum scarcity and physical interference.

The court's holding conflicts with decisions in various circuits. In those cases the courts have upheld against a First Amendment challenge, limitations imposed by the Commission on the right of cable television systems to cary such programming as they may choose and in so doing have rejected the argument that a different result is required because "CATV systems do not themselves use the airwaves in their distribution systems." *Black Hills Video Corporation* v. *FCC,* 399 F.2d 65, 69 (8th Cir. 1968). Instead, when cable systems "use radio signals and . . . have a unique impact upon, and relationship with, the tele-

[17] After appearing to equate television systems with newspapers for purposes of government intrusion into their First Amendment rights (App. A, p. 80), the court then immediately indicates that regulation of cable television can be valid if this Court's test in *United States* v. *O'Brien,* 391 U.S. 367, 377 (1968), is satisfied. Although the court refers to other cases where *O'Brien* has been applied (App. A, p. 85 and n.92), none involve newspapers.

vision broadcast service," they have "the same constitutional status [as broadcast stations] under the First Amendment." *Id.*

Under this test, the pay cable rules invalidated below should have been upheld under the First Amendment. Regulation of broadcasting for the purposes of preserving popular entertainment programming for free television and encouraging the development of the pay medium as a supplemental service has been upheld. *NATO, supra;* see also App. A, pp. 108–112. Moreover, although the opinion below does not make this clear,[18] the cable systems to whom the pay cable rules apply are only those which use broadcast signals. Finally, the operation here being regulated, namely the video cablecasting of programs "indistinguishable from network programs when they arrive on the television receiving set in the home"[19] by cable systems whose channels are also being used to carry regular television programs is one which clearly has a "unique impact upon, and relationship with, the television broadcast

[18] Contrary to the Court's suggestion that the Commission has previously applied its rules "to cable systems that did not use broadcast signals," App. A, p. 78 and n. 80, the Commission's regulations have only been applied to systems using broadcast signals, even though the subject matter of particular regulations has not always been confined to broadcast signals. See, *e.g.*, *Midwest Video*, *supra*, 406 U.S. at 667–68 and 673 (program origination requirement); *ACLU* v. *FCC*, 523 F.2d 1344 (9th Cir. 1975) (access requirements).

[19] *National Association of Regulatory Utility Commissioners* v. *FCC*, 533 F.2d 601, 616 (D.C. Cir. 1976).

service." *Black Hills Video Corporation, supra,* 399 F.2d at 69.[20]

Other courts of appeals have either expressly adopted the holding in *Black Hills* concerning the First Amendment or reached a similar conclusion upholding retraints on programming which can be carried over cable systems.[21] In addition to a conflict with these cases, the opinion below also places in doubt the Commission's right to pursue policies previously upheld, but in cases where a First Amendment challenge was either not reached or not raised. See, *e.g., Midwest Video, supra* (program origination); *ACLU* v. *FCC, supra,* (access requirements).

The court below, referring paticularly to the *Black Hills* case and an earlier case in its own circuit, *Buckeye Cablevision, Inc.* v. *FCC,* 387 F.2d 220 (1967), acknowledged the possibility of a conflict be-

[20] The court below was skeptical at best about a relationship between cablecasting and signal retransmission. App. A., pp. 78–79 and n.80. However, a majority on this Court has recognized the "interdependencies between [broadcast transmission] and cablecasts." *Midwest Video, Supra*, 406 U.S. at 662–63 and n.21 (plurality opinion); and at 675 (concurring opinion of Chief Justice Burger in which he pointed out that "CATV is dependent totally on broadcast signals.") See also a letter to the editor of the Washington Star, Jan. 22, 1976 at p. 14, from the President of the National Cable Television Association, in which he said that "[p]ay cable TV, for which cable TV subscribers pay an extra monthly fee is only one service offered as a part of the total CATV package."

[21] See, *e.g., Conley Electronics Corp.* v. *FCC*, 394 F.2d 620, 624 (10th Cir.), *cert. denied*, 383 U.S. 858 (1968); *Tituaville Cable TV, Inc.* v. *United States*, 404 F.2d 1187, 1190 (3rd Cir. 1968), *Great Falls Community TV Cable Co.* v. *FCC*, 416 F.2d 238, 240–42 (9th Cir. 1969).

tween its resolution of the First Amendment issue and that reached in these earlier cases. It indicated that those opinions had perhaps failed to consider the significance of distinguishing for constitutional purposes between regulation where microwave broadcast facilities were involved and the direct regulation of cable television systems which did not use microwave broadcast facilities (App. A, pp. 78–79 and n. 80).

However, the court in *Conley Electronics Corporation, supra*, was specifically asked to distinguish that case from earlier cases where First Amendment challenges had been unsuccessful, on the ground that they were concerned with licensing microwave carriers and not with direct regulation of cable systems. The Court held that "the cases are indistinguishable. In both situations what is involved is reasonable regulation in the public interest." 394 F. 2d at 624 (citation omitted).[22]

Apart from other court cases, the opinion below casts a constitutional doubt on at least two different statutes in which Congress has evidenced an intent not to distinguish between broadcast stations and cable television systems subject to Commission jurisdiction.

[22] A distinction based upon whether microwave facilities are being used has also not been of decisional significance in other contexts. *Southwestern Cable Co., Supra* (Commission jurisdiction over non-microwave CATV systems upheld); *CBS, Inc.* v. *Teleprompter Corp.*, 476 F. 2d 338, 348–49 (2d Cir. 1973) (copyright liability for carriage of local signals does not turn upon whether microwave links are used in the carriage), *affirmed in part and reversed in part on other grounds*, 415 U.S. 394 (1974).

In both instances the particular legislation has clear First Amendment overtones. Thus, cable television systems, like broadcasters, are subject to the equal time requirement in the Communications Act. 47 U.S.C. § 315(c). Similarly, the statute which prohibits cigarette advertising is applicable not only to broadcasters, who unsuccessfully challenged its constitutionality before this Court,[23] but to "any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission." 15 U.S.C. § 1335.

III. THE COURT HAS APPLIED THE STANDARD OF REVIEW OF AGENCY ACTION IN INFORMAL RULEMAKING IN A MANNER THAT CONFLICTS WITH DECISIONS OF THIS COURT AND VARIOUS COURTS OF APPEALS AND SEVERELY LIMITS THE ABILITY OF THE COMMISSION TO MEET FUTURE PROBLEMS BEFORE THEY OCCUR

While giving lip service to the proper standard of review of agency action in informal rulemaking, the court has applied the arbitrary and capricious standard contained in 5 U.S.C. § 706(2)(A) in a manner which conflicts with decisions of this Court and various courts of appeals, including the court below. These decisions, unlike the opinion below, have manifested a willingness to permit regulatory agencies to "plan

[23] *Capital Broadcasting Co.* v. *Mitchell*, 333 F. Supp. 582 (D.D.C. 1971), judgment affirmed, 405 U.S. 1000 (1972).

in advance of forseeable events"[24] and to act on the basis of their own forecasts and expert judgments even when the record does not contain concrete supporting evidence of the benefits to be advanced or the harm to be avoided. This latitude for agencies attempting to regulate for the future has been specifically approved in cases involving this Commission, as well as other agencies.

With respect to the Commission, its responsibility is "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service." 47 U.S.C. § 151. This Court has recognized that this obligation requires the Commission to do more than simply monitor communications activities with a view toward taking affirmative action only when actual injury to the public interest is observed, or when it can prove with certainty the consequences of inaction. Thus, when the Commission came before this Court, in *Southwestern Cable, supra,* in defense of its authority to regulate cable television "as a *supplement* rather than a substitute for off-the-air television service,"[25] it acknowledged that "it could not

[24] *Southwestern Cable, supra,* 392 U.S. at 177. See also Verkuil, *Judical Review of Informal Rulemaking,* 60 Va. L. Rev. 185 (1974), for an analysis of "the District of Columbia Circuit Court's attempt to develop new standards of review for informal rulemaking." *Id.* at 208.

[25] *First Report and Order in Docket 14895,* 38 FCC 683, 701 (1965) (emphasis supplied). See also 38 FCC at 699 and the *Second Report and Order in Docket 14895, supra,* 2 FCC 2d at 735. The court below, in faulting the Commission for not justifying the position that cable television should be a supplemental service, (App. A. p. 60), disregards the long history of the Commission's policy on this matter and instead erroneously embarks on its own inquiry "into the wisdom of the regulations that the Commission promulgates." *United States* v. *Allegheny-Ludlum Steel Corp.,* 406 U.S. 742, 749 (1972).

predict with certainty the consequences of unregulated CATV." 392 U.S. at 176–177. Nevertheless, this Court concluded that the imprtance of the Commission's efforts to regulate cable for the purpose of developing and maintaining an effective off-the-air system "can scarcely be exaggerated, for broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population," and it affirmed the Commission's judgment that, notwithstanding the uncertainties, "its statutory responsibilities demand that it 'plan in advance of foreseeable events, instead of waiting to react to them.'" *Id.* at 177 (citation omitted.)[26]

Shortly after *Southwestern,* the Commission again found it appropriate to act to preserve the general public's right to continue to receive informational and popular entertainment programming via the conventional advertiser-supported off-the-air television service. This time, the subject of the regulations was the pay broadcasting service. Again the Commission received judicial approval of its efforts to regulate for the future. *NATO, supra,* 420 F. 2d at 206–208.

[26] Although this Court in *Southwestern* did not specifically pass upon the validity of the Commission's regulations, *Id.* at 167, their validity was "subsequently and correctly upheld by courts of appeals." *Midwest Video, supra,* 406 U.S. at 659 and n. 17 (citation omitted).

The court in *NATO* found the regulations "to protect free television" and "to prevent the more popular kinds of free programs from migrating to subscription television" were "reasonable and amply supported by the record." 420 F.2d at 206.

A similar "rational connection between the facts found and the choice made," *Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156, 168 (1962), should have been made in the present case under a proper application of the standard of review. The court sought to distinguish the case below from *NATO* on the ground that the subscription television rules upheld in *NATO* were "based on elaborate data generated in a two-year trial of subscription broadcast television in Hartford, Connecticut." (App. A. p. 101). However, to the extent that the data and conclusions developed in the Hartford experiment (for example, data concerning the viewing preferences of subscription patrons) established the foundation for rules to protect the free television service against incursion by a pay service, the support provided is just as applicable to pay cablecasting as it was to pay broadcast-

[27] *See* 23 FCC 2d at 828, where the Commission said, "where cablecasting is accompanied by a per-program or per-channel fee, it is akin to subscription television and presents the same threat of siphoning"; (App. C, p. 168–69), "the rationale behind the anti-siphoning rules applies equally to both forms of subscription service," and "we see no justifiable distinction between over-the-air and cable operations which would warrant unequal treatment under our rules"; and (App. C, p. 170), "both pay cable and STV present siphoning potential."

ing.[27] Moreover, it is clear from the Commission's *Fourth Report and Order on Subscription Television, supra,* which was before the Court in *NATO,* that the Commission, notwithstanding some data from the Hartford experiment, was still forced to base its regulations there on its best judgment as to future events, even though it recognized it was dealing with "imponderables." *Id.* at 507–08.[28]

Here, even though the Commission again was confronted with a situation where relevant factors did not lend themselves to precise forecasts,[29] it nevertheless had more evidence available to it than it had when it adopted the first subscription rules before *NATO.* Its experience since 1968 substantiated "the basic conclusion upon which the program restrictions were premised—that subscription programming will consist largely of feature films, series and sports events, all of which are mainstays of conventional television programming" (App. C, p. 171). Moreover, this time instead of dealing with an unborn industry as in *NATO,* the Commission was dealing with an industry which was growing by leaps and bounds. From 16,000 subscribers in March 1973, the pay cable industry had

[28] The *NATO* court suffered from no illusions concerning the nature of the record in that case, since it noted that the Commission's concern was with the "possibility" of siphoning and the "potential impact of [subscription television] on poor people and free television." 420 F.2d at 197, 207.

[29] *See* e.g., *CBS Television Network Affiliates Association* v. *FCC,* --- F.2d --- (D.C. Cir. 1977) where the court said, in another cable context that "predicting the rate of future cable growth would be exceptionally difficult." Slip op. No. 75–1491 of March 31, 1977 at p. 13 and n. 15 (citation omitted).

increased its audience to over 100,000 by September 1974, (App. C, p. 133), and by the time this case was argued in court in April 1976 the number had jumped to 400,000. The use of satellite facilities held the promise of increasing even that growth rate.[30]

Cases in contexts other than the Commission's regulation of cable television and pay broadcasting have also upheld Commission actions in advance of foreseeable events even where the consequences of both action and inaction are admittedly uncertain. In short, these cases establish that the Commission in its policy-making role "does not have to wait for evidence that can only be supplied by the future." *National Association of Independent Television Producers and Distributors* v. *FCC*, 516 F. 2d 526, 541 (2d Cir. 1975).[31]

[30] *See Teleprompter Corp.* v. *CBS*, 415 U.S. 394, 405 (1974) where this Court referred to the likelihood that an interconnection arrangement among cable systems could allow cable systems "to compete more effectively with the broadcasters for the television market."

[31] *See, e.g., FCC* v. *RCA Communications, Inc.*, 346 U.S. 86, 96–97 (1953); *Mt. Mansfield Television, Inc.* v. *FCC*, 442 F.2d 470, 483–84 (2d Cir. 1971); *Washington Utilities and Transportation Commission* v. *FCC*, 513 F. 2d 1142, 1160 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975). Nor is this a principle peculiar to just this Commission. *See, e.g., United States* v. *Detroit and Cleveland Navigation Co.*, 326 U.S. 236, 241 (1945), holding that "uncertainties as to the future" need not "paralyze the [Interstate Commerce Commission] into inaction"; *Federal Power Commission* v. *Transcontinental Gas Corp.*, 365 U.S. 1, 29 (1961), where this court rejected arguments that the FPC should have adduced testimonial and documentary evidence to the effect that its forecast would come true stating, "we think that a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency"; *American Airlines* v. *Civil Aeronautics Board*, 192 F. 2d 417, 421 (D.C. Cir. 1951) (quoting from CAB's opinion), where the court approved a Civil Aeronautics Board decision to "take into account and give appropriate weight to broad considerations of future welfare," and to follow an approach "necessarily predicated upon future estimates as well as present facts for it is keyed to future goals and an effort to envisage the shape of things to come"; and *Amoco Oil Co.* v. *EPA*, 501 F. 2d 722, 741 (D.C. Cir. 1974), where the court stated that, "[w]here... the regulations turn on choices of policy, on an assessment of risks, or on predictions dealing with matters on the frontiers of scientific knowledge, we will demand adequate reasons and explanations but not findings of the sort familiar from the world of adjudication."

However, the court below followed a different course. It appears to demand that the proponents of the regulations "prov[e] their case" (App. A. p. 64) before the Commission can act.[32] The imposition of such a prerequsite would paralyze federal agencies. The question before the court is not whether proponents before the agency have "proved" the need for regulations, but whether the "challenger of agency regulations [has] demonstrate[d] that they are arbitrary and capricious." *American Nursing Home Association* v. *Cost of Living Council*, 497 F.2d 909, 914 (TECA 1974). *See* also *Angel* v. *Butz*, 487 F.2d 260, 263 (10th Cir. 1973), *cert. denied*, 417 U.S. 967 (1974).

[32] Several parties had submitted mathematical demonstrations attempting to show the point at which pay cable could outbid the networks for specific programs. The court dismisses the relevancy of those showings, stating that they were invalid since they attempted to compare the present-day programming "expenditures" of the networks with the forecast per-program "income" of the pay cable industry in 1980. (App. A, p. 63–65). Such comparisons might not be the best evidence to aid an agency

The effect of the application of the standard of review below, if left unchecked by this Court, will be to permit a court, in the guise of following the arbitrary and capricious standard of review, to "substitute its judgment for that of the agency," contrary to the teaching of this Court.[33] *Citizens to Preserve Overton*

to make determinations in concrete situations where exact comparable figures are available, but in situations where the agency is trying to gauge "potential" impact they cannot be said to be irrelevant. Moreover, the court's suggestion that the Commission should have analyzed whether conventional television could dig deeper into its pockets to outbid the cablecasters does not rebut the probability of impact, and would only thrust the Commission in a never ending circle of speculation trying to determine at what point the impact would become unmanageable.

[33] The court has misread the Commission's order when it describes that order as having found that "anticompetitive effects could be tolerated because cable use of broadcast signals constituted 'unfair competition' and *consequently* regulation was needed 'to ameliorate the risk that the burgeoning CATV industry would have a future adverse impact on television broadcast service, both existing and potential." (App. A, p. 71, emphasis added.) The Commission unmistakably listed two reasons and separated them by numbering them (1) and (2). The unfair competition rationale, rejected by the court, was number (1)—there was no "consequently" in the Commission order—and number (2) was "to ameliorate the risk . . . [of] a future adverse impact on television broadcast service." See 2 FCC 2d at 736 (App. C, p. 167). This second rationale, not considered by the court, was the rationale most directly applicable to subscription cablecasting. To ignore it is to ignore the whole purpose of the antisiphoning rules, which is to insure that the public's necessary reliance on conventional television shall not be impaired by siphoning of programming to subscription services which cannot be made available to all of the people. (App. C, p. 167). The Commission's determination that the "public interest in maintaining the conventional television structure has outweighed the interest in unregulated competition," *Ibid.*, "re-

Park v. *Volpe,* 401 U.S. 402, 416 (1971). The pitfalls associated with this judicial substitution of judgment are amply illustrated by this case. Thus, for example, in expressing its disagreement with the Commission's judgment that siphoning would lead to a loss of popular programs for audiences not served by cable systems, the court expressed its belief that it would be to the "economic advantage of cable operators to sell broadcast rights to conventional television stations in regions of the country where no cable service existed." (App. A, p. 66, and 54). What the court failed to consider was that conventional television stations which serve non-cable regions do not serve *only* these regions. When any part, however small, of the audience within the reach of a broadcast station's signal has access to cable service, then the court's assumption about cable operators' willingness to share broadcast rights fails. The fact is that the great majority of people who live in non-cable areas receive their television service from broadcasters whose television markets encompass some cable. As petitioners below have conceded, "it is doubtful" that even a majority of pay cable subscribers would pay to watch a program on cable if the same program was simultaneously available on a broadcast station "without the

flects the kind of judgment that is entrusted to it, a power to weight the competing interests and arrive at a balance that is deemed 'the public convenience and necessity.'" *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 293 (1974) (citing *United States* v. *Pierce Auto Lines*, 327 U.S. 515, 535–536 (1946)). See also *United States* v. *Drum*, 368 U.S. 370, 374–375 (1962).

necessity of making a direct payment." *Initial Comments of Time Incorporated, Home Box Office, Inc. and Manhattan Cable Television, Inc. in Docket No. 19554,* at 65 (filed Sept. 20, 1974).[34]

IV. THE COURT'S BLANKET PROHIBITION OF *EX PARTE* CONTACTS IN INFORMAL RULEMAKING IS CONTRARY TO LAW

The Commission's action was also challenged below by an *amicus,* Mr. Henry Geller, on the ground that the agency had received *ex parte* communications during the course of the pay cable proceeding which had affected the final form of the adopted rules. Mr. Geller contended that such communications were impermissible under the doctrine of *Sangamon Valley Television Corp.* v. *United States,* 269 F.2d 221 (1959) because in his view the instant case, like *Sangamon* involved "conflicting private claims to a valuable privilege."

The court below agreed with Mr. Geller that *Sangamon* was applicable to this case and that the Com-

[34] Similarly, the court below erred when it expressed its belief that the restrictions against advertising during pay programs, far from serving, as the Commission believed, as a means of encouraging the pay medium to offer innovative programming, actually kept pay cable from being available to poor people. If there were advertising, the court believed that rates could come down and the poor might then be able to subscribe. (App. A, p. 67). What the court overlooked was that people do not obtain pay service for an additional charge unless they subscribe to the regular cable service whereby there is first a payment to get hooked up, followed by a monthly fee of $4 to $6 before the possibility of an additional fee for pay cable even comes up. It was not unreasonable for the Commission to act on the assumption that this kind of arrangement is likely to be financially unattractive, generally speaking, to poor people.

mission's *ex parte* contacts were therefore improper (App. A, p. 93). The court also asserted, however, that pursuant to the "mandate" of *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402 (1971), the "public record" must reflect all relevant information presented to an agency during the course of its proceedings (App. A, 98–99). It therefore did not limit its ultimate holding to cases involving "conflicting private claims to a valuable privilege." Instead, it barred *ex parte* contacts in all informal rulemakings, stating (at *id.,* pp. 105–106) that:

> Once a notice of proposed rulemaking has been issued . . . any agency official or employee who is or may reasonably be expected to be involved in the decisional process of the rulemaking proceeding, should "refus[e] to discuss matters relating to the disposition of a [rulemaking proceeding] with any interested private party, or an attorney or agent for any such party, prior to the [agency's] decision . . ." [citation omitted]. If *ex parte* contacts nonetheless occur, we think that any written document or a summary of any oral communication must be placed in the public file established for each rulemaking docket immediately after the communication is received so that interested parties may comment thereon [citation omitted].

In a special concurring opinion, Circuit Judge MacKinnon averred that, while the court's treatment of the *ex parte* matter was appropriate to this case, its holding was "overly broad" (App. B, p. 119). In Judge MacKinnon's view, *ex parte* contacts should be restricted in informal rulemaking only where such

proceedings involved either "competing private claims to a valuable privilege," as in *Sangamon,* or "selective treatment of competing business interests of great monetary value," as in the instant case (*Id.,* p. 122). Judge MacKinnon also questioned the court's reliance on *Overton Park, supra,* noting that in the instant case, "there is no statutory requirement for specific findings nor are the regulations limited to the full administrative record" (*Id.,* p. 119).

Thus, the opinion of the court below, in striking down the procedures followed in this informal rulemaking proceeding with respect to *ex parte* communications, promulgates entirely different ground rules from those which have been consistently followed by the Federal Communications Commission and other agencies in attempting to discharge their quasi-legislative functions. Indeed, the opinion in this case, if left to stand, would all but eliminate the "dichotomy"[35] between informal rulemaking, on the one hand, and adjudication and formal rulemaking, on the other, which, as this court has recognized in *American Trucking Associations* v. *United States,* 344 U.S. 298 (1953); *United States* v. *Allegheny-Ludlum Steel Corp.,* 406 U.S. 742 (1972); and *United States* v. *Florida East Coast Railway Co.,* 410 U.S. 224 (1973), is the touchstone of modern administrative law. Accordingly, certiorari should be granted.

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[35] *American Airlines, Inc.* v. *CAB,* 359 F. 2d 624 (D.C. Cir. 1966), *cert. denied,* 385 U.S. 343 (1966).

A. OVERTON PARK AND THE SUNSHINE ACT ARE INAPPLICABLE TO THE INSTANT PROCEEDING

In reaching its conclusion that there should be a total ban on *ex parte* contacts in rulemaking, the court below ignores a long line of cases which hold that, when an agency is engaged in rulemaking, it is not bound by the materials formally submitted to it, but may look beyond them in order to draw upon its expertise. *Pacific Coast European Conference* v. *United States,* 350 F.2d 197, 205 (9th Cir. 1965) *cert. denied,* 382 U.S. 958 (1965); *California Citizens Band Association* v. *United States,* 375 F.2d 43, 54 (9th Cir. 1967); *General Telephone Co. of the Southwest* v. *FCC,* 449 F.2d 846, 862 (5th Cir. 1971); *Angel* v. *Butz,* 487 F.2d 260, 262–263 (10th Cir. 1973), *cert. denied,* 417 U.S. 967 (1974); *Flying Tiger Line, Inc.* v. *Boyd,* 244 F. Supp. 889, 892 (D.D.C. 1965); *cf. SEC.* v. *Chenery Corp.,* 332 U.S. 194, 208 (1947); *NLRB* v. *Seven-Up Bottling Co.,* 344 U.S. 344, 348–49 (1953); *United States* v. *Florida East Coast Railway Co., supra,* 410 U.S. at 235; *City of Chicago* v. *FPC,* 458 F.2d 731, 746 (D.C. Cir. 1971), *cert. denied,* 405 U.S. 1074 (1972); *Chrysler Corp.* v. *Department of Transportation,* 472 F.2d 659, 668–669 (6th Cir. 1972); *Moss* v. *FPC,* 502 F.2d 461, 465 (D.C. Cir. 1974), *cert. denied,* 422 U.S. 1020 (1975). Moreover, the court all but concedes that there is no basis for its holding in the Administrative Procedure

Act, which, as the Attorney General stated in 1947, "clear[ly] does not require the formulation of rules upon the exclusive basis of any 'record' made in informal rule making proceedings." *U.S. Department of Justice, Attorney General's Manual on the Administrative Procedure Act 31.* Accordingly, the court relies almost exclusively on *Overton Park, supra,* asserting that "whatever the law may have been in the past [footnote omitted], there can now be no doubt" that it is obligated to test rules promulgated by the Commission against the "full administrative record" that was before the agency at the time it made its decision (App. A, pp. 97–98).

However, this Court specifically noted in *Overton Park* that it was not dealing there with rulemaking, 401 U.S. at 414, but with informal action pursuant to a specific statutory mandate. *Id.* at 405. Accordingly, since rulemaking is involved here, and there is no specific statutory mandate, *Overton Park* "has no application." *Angel* v. *Butz, supra,* 487 F.2d at 263. Therefore, the Commission "need not . . . compile a record of the material upon which its rule is based" and "may act on the basis of data contained in its own files or on its own views or opinions." *Chrysler, supra,* 472 F.2d at 669. See also *American Trucking Associations, Inc., supra.* Moreover, "a reviewing court cannot test the rule as promulgated against the evidence in the agency's record." *Chrysler, supra; Flying Tiger Line, supra.*

The court's reliance on *Overton Park* in connection with *ex parte* matters is also inconsistent with one of its own precedents. In *D.C. Federation of Civic Associations* v. *Volpe,* 459 F.2d 1231, 1247 (1972), *cert. denied,* 405 U.S. 1030 (1972), the court stated that if the administrative action there had been "purely legislative," it "might have agreed" that the decision could stand in spite of "extraneous pressures." In the instant case there is no doubt whatever that the Commission's action was "purely legislative." Therefore, according to the court's own reasoning in *D.C. Federation,* that action should be upheld. See also *Angel* v. *Butz, supra; cf. Fletcher* v. *Peck,* 10 U.S. (6 Cranch) 87 (1810); *United States* v. *O'Brien,* 391 U.S. 367 (1968).

The opinion below also cites *Overton Park, supra,* for the proposition that where an agency "justifies its actions by reference only to information in the public file while failing to disclose the substance of other relevant information that has been presented to it, a reviewing court cannot presume that the agency has acted properly" (App. A, p. 99). But *Overton Park* explicitly reaffirmed the long held principle that an agency's action "is entitled to a presumption of regularity." 401 U.S. at 415, citing *Pacific States Box and Basket Co.* v. *White,* 296 U.S. 176, 185 (1935); *United States* v. *Chemical Foundation,* 272 U.S. 1, 14–15 (1926). Moreover, the problem in *Overton Park* was that the administrator had failed to justify his action at all. 401 U.S. at 407–08, 420;

compare *United States* v. *Morgan,* 313 U.S. 409, 414 (1941). This was made clear in *Camp* v. *Pitts,* 411 U.S. 138, 143 (1973), where this Court stated that "[u]nlike *Overton Park* . . . there was contemporaneous explanation of the agency decision. The explanation may have been curt, but it surely indicated the determinative reason for the final action taken[.]" In the instant case, there was also a contemporaneous explanation of the agency decision, and it was not curt, but exhaustive. Accordingly, the Commission's action must stand or fall on that explanation; the court has no right to go behind it absent a strong showing of "bad faith or improper behavior," neither of which is evident here. *Overton Park, supra,* 401 U.S. at 420.[36]

In any event, *Overton Park* addresses only the question of what must be available to the courts on review; it says nothing about making data available to the parties for comment during the course of a proceeding.[37] According to the court below, however, such disclosure is essential because of the importance of "adversarial discussion" to agency decisionmaking and judicial review. But to require that there be

[36] It is also significant that although the Court in *Camp* recognized that bank charter proceedings are largely conducted *ex parte*, it did not hold that this caused any procedural infirmity. 411 U.S. at 141; see also *Bank of Commerce of Laredo* v. *City National Bank of Laredo*, 484 F.2d 284, 287, (5th Cir. 1973), *cert. denied*, 416 U.S. 905 (1974), and cases cited therein.

[37] In this connection, it is significant that no party to this proceeding has accused the Commission of attempting to base its pay cable rules on anything as to which there was not a fair opportunity for comment.

complete disclosure and "adversarial discussion" of everything said and done in rulemaking proceedings is to forget that:

> [R]ule making is a vital part of the administrative process, particularly adapted to and needful for sound evolution of policy in guiding the future development of industries subject to intensive administrative regulation in the public interest,

and that:

> [S]uch rule making is not to be shackled in the absence of clear and specific Congressional requirement, by importation of formalities developed for the adjudicatory process and basically unsuited for policy rule making.

American Airlines v. *CAB, supra,* 359 F.2d at 629. Indeed, to require such disclosure and discussion is, in effect, to require a hearing on the record, in contravention of the Administrative Procedure Act and the holdings of this Court in *American Trucking Associations, supra; Florida East Coast, supra;* and *Allegheny-Ludlum, supra.*

The court below further contends that its opinion here is consistent with the objectives of the Government in the Sunshine Act, Pub. L. No. 94–409, 90 Stat. 1241 (1976). However, a proposal to prohibit *ex parte* contacts in informal as well as formal rulemaking was included in an early version of that act,[38]

[38] S. 260, 93rd Congress, 2d Sess. (1974). See House and Senate Committees on Government Operations, 94th Cong., 2d Sess., Government in the Sunshine—S. 5 (Public Law 94–409) Source Book: Legislative History, Texts and Other Documents 88 (1976).

but was ultimately removed by the Congress.[39] Congress also failed to pass proposed legislation calling for the logging and disclosure of *ex parte* contacts.[40] Thus, not only is the court's opinion not consistent with the Sunshine Act, it is directly contrary to the intent of Congress in enacting that legislation.

In this connection, it is noteworthy that *amicus* Geller, in testimony before a Senate subcommittee, applauded as "wise" the deletion of the provision in S. 260 calling for a general ban on *ex parte* contacts in rulemaking.[41] It was Mr. Geller's contention that existing case law, including *Sangamon,* was sufficient to cover those rulemaking situations where *ex parte* contacts would be inappropriate.[42]

It is also noteworthy that, contrary to the court's contention at n. 128 of its opinion, the Bar of the City of New York opposed the "extension of the *ex parte* prohibition of the Sunshine Act to informal rulemaking."[43] So too did the Administrative Conference of the United States;[44] thus, the court erred in asserting

[39] Source Book, *supra* at 230 (Senate report), 530, 568 (House reports) 811 (conference report).

[40] S. 1239, 94th Congress, 1st Sess. (1975).

[41] Government in the Sunshine: Hearings on S. 260 before a Subcommittee of the Senate Committee on Government Operations, 93rd Congress, 1st Sess. 219, 222 (1974) (hereafter "Senate hearings").

[42] As noted *infra*, however, Mr. Geller has only recently come to the conclusion that proceedings like that involving pay TV should be governed by *Sangamon.*

[43] Government in the Sunshine: Hearings on H.R. 10315 and H.R. 9368 before a Subcommittee of the House Committee on Government Operations, 94th Congress, 1st Sess. 256 (1975).

[44] Senate hearings, *supra* at 248–49, 260.

(at n. 130) that compliance with its opinion would be in compliance with that body's recommendations.

Thus, whether or not *ex parte* communications in informal rulemaking are desirable as a matter of policy, they are clearly permissible as a matter of law, and the court's far reaching holding to the contrary warrants the attention of this Court.

B. THE SANGAMON CASE DOES NOT GOVERN THE INSTANT PROCEEDING

The court below has also extended its earlier holding in *Sangamon, supra,* to the entirely different factual setting of informal policy making proceedings. This action warrants this Court's attention because, as construed by the court below, *Sangamon* would lead on a broad scale to an obliteration of the distinction between rulemaking and adjudication.[45]

Certainly this case and *Sangamon* bear little, if any resemblance to each other; the latter involved a handful of would-be broadcasters contesting the assignment of a single VHF television channel, while the former involves a panoply of broadcast, cable, motion picture, sports, cultural and other interests contesting

[45] *Amicus* Geller appears to believe that the situations in which *Sangamon* would apply would be relatively few in number. The Commission is of the view, however, that if the doctrine of *Sangamon* were applied to the instant case, there would be few, if any, rulemakings to which it would not also apply. In the Commission's opinion, rulemakings almost invariably attract participants who will be affected in some manner by their outcome, and who in some sense stand to gain or lose a "valuable privilege" in the sense that the term is used by *amicus* Geller.

the future of several industries. Moreover, most of those who have analyzed *Sangamon* have stressed its unique characteristics. In the words of one leading commentator:

> The peculiar facts situation and combination of interests and expectancies of parties involved in [The *Sangamon*] rulemaking proceeding . . . converted it into an adversary proceeding to which the judicial ethic was applicable. *Peck, Regulation and Control of Ex-Parte Communications with Administrative Agencies, 76 HARV. L.REV. 233, 241 (1962).*

Indeed, even *amicus* Geller has confessed that, during his tenure as a senior FCC official, he too "failed to recognize the applicability of *Sangamon*" to cases like the one at bar [46]—a confession of some relevance, since it was Mr. Geller who, in 1959, wrote the original *Sangamon* brief for the Department of Justice and coined the phrase "conflicting private claims to a valuable privilege" which was later adopted by the court. Furthermore, Mr. Geller has acknowledged the Commission's "good faith purpose" in declining to follow *Sangamon* in proceedings involving general issues—the "need for communication between the Commission and the industry . . . concerning problems of mutual interest." [47]

Nevertheless, in asserting the applicability of *Sangamon* here, the court below insists that it "would

[46] See page 6 of Mr. Geller's "Petition for Revision of Procedures or for Issuance of Notice of Inquiry or Proposed Rule Making," filed with the Commission December 12, 1974.

[47] *Id.* at 5, quoting *Rules Governing Ex Parte Communications*, 1 FCC 2d 49, 57 (1965).

have thought that the principles announced there so clearly governed the instant proceeding that there could be no question of the impropriety of *ex parte* contacts here" (App. A, pp. 102–103). In reaching the opposite conclusion, however, the Commission relied, and continues to rely herein, on two other cases from the District of Columbia Circuit, *Courtaulds (Alabama) Inc.* v. *Dixon,* 294 F. 2d 899 (1961) and *Van Curler Broadcasting Corp.* v. *United States,* 236 F. 2d 727 (1956), *cert. denied,* 352 U.S. 935 (1956). In *Courtaulds,* it was stipulated that, prior to the issuance of certain final rules, the FTC had sought, received and considered *ex parte* information relating to the merits of the proceeding from various parties, including competing manufacturers. *Courtaulds, supra* at 902, n. 10. Despite this, the court there refused to invalidate the regulations since it found "no evidence that the Commission did anything improper or gave to any interested party advantages not shared by all." *Id.* at 904–905. The *Courtaulds* court distinguished *Sangamon* on several grounds, one being that "the [*Courtaulds*] proceeding clearly was one of rule making, both in form and substance, and hence was not subject to all the restrictions of a quasi-judicial hearing." *Id.*

The court below attempts to explain away *Courtaulds* on the ground that the Commission here did act in secret (App. A, p. 103, n.124). But all interested parties to this proceeding were informed that they had equal opportunity to present whatever information they wished, without being confined to official

comments."[48] Also, footnote 16 of *Courtaulds* does not erroneously suggest, as the court below would have it, that *Sangamon* "did not involve rulemaking." It does suggest, however, that the holding of *Sangamon* should be limited to "quasi-judicial" proceedings.

In refusing to find any impropriety in the FTC's considerations of *ex parte* communications, the *Courtaulds* court (also at n.16 of its opinion) referred to the earlier case of *Van Curler, supra.* In *Van Curler,* the court held that there was "nothing improper or erroneous" in the Commission's receipt of *ex parte* material "in regard to the nation-wide intermixture problem, concerning which the Commission was seeking all sorts of advice and information preparatory to setting up a general nation-wide rule-making proceeding." 236 F.2d at 730. Since pay television is also a "nation-wide" issue, the Commission believes that *Van Curler* affords a much closer parallel to the instant case than does *Sangamon.*[49]

It should also be noted that, in 1975, *amicus* Geller raised the issue of the reach of *Sangamon* before the Second Circuit Court of Appeals in connection with the Prime Time Access Rule. That case also involved a dispute, nationwide in scope, among many industries, as to what the Commission's policy should be

[48] See, in this respect, Section C, *infra.*

[49] In pleadings before the court below, *amicus* Geller sought to distinguish *Van Curler* on the ground that the *ex parte* contacts there took place before the general rulemaking had actually started. However, the reference to *Van Curler* in *Courtaulds* suggests that conversation of the type approved in *Van Curler* need not be confined to the prenotice period.

with respect to the marketing pattern for prime time television programs. The Second Circuit, however, did not hold that *ex parte* contacts had invalidated the Commission's procedures, nor did it grant Mr. Geller's request for a remand. Instead, its opinion did not even mention the argument based on *Sangamon. National Association of Independent Television Producers and Distributors* v. *FCC,* 516 F.2d 526 (1975).[50]

C. THE COMMISSION DID NOT VIOLATE ITS OWN RULES IN PERMITTING THE EX PARTE CONTACTS HEREIN

The court below also asserts (although no such claim was made by *amicus* Geller or any other party) that when the Commission permitted *ex parte* contacts in this proceeding, it violated its own Rule 1.415, which provides that written comments and replies may be

[50] In reversing the Commission, the court below also relies on Executive Order 11920, 41 Fed. Reg. 23665 (1976), which it characterizes as analogous to *Sangamon* (App. A, p. 104). However, the fact sheet issued by the White House in connection with this order reveals a *sui generis* situation which cannot be compared either to *Sangamon* or the instant case. Specifically, it appears that under Section 801 of the Federal Aviation Act, and pursuant to his constitutional responsibility for foreign policy and national defense, the President has authority to approve or disapprove certain decisions of the Civil Aeronautics Board. Nevertheless, the CAB is supposed to decide these cases in the first instance through its regular channels and according to all ordinary (*i.e.*, other than *raison d'etat*) criteria. (It is significant that all of the relevant CAB actions involve hearings rather than notice and comment procedures.) Executive Order 11920 was issued to prevent people from taking advantage of Section 801 to bypass the CAB and go straight to the President on matters which should have been left to the agency. This rationale has no application to the instant case; accordingly, the court's citation is inapposite.

submitted and that "no additional comments may be filed unless specifically requested or authorized." 47 C.F.R. 1.415; see App. A, pp. 100–101, n.122. A similar result was reached in *Sangamon, supra,* and shortly thereafter the Commission publicly and explicitly declared that its notice and comment procedures were "not intended to preclude the informal submission of other information and arguments." *Rules of Practice and Procedure,* 24 Fed. Reg. 6057 (1959).[51] More recently, in a document entitled *The Public and Broadcasting—A Procedure Manual,* 39 Fed. Reg. 32288, 32295 (Rev. ed. 1974), the Commission reiterated that it might "tap other sources of information" besides written comments in making the policy judgments involved in rulemaking, and the agency added that "unless otherwise stated in the notice, staff members working on the proceeding are generally prepared to meet with and discuss the proposed rule with anyone who is sufficiently interested." It is fundamental that an agency's interpretations of its own rules are "of controlling weight unless plainly erroneous." *Udall* v. *Tallman,* 380 U.S. 1, 16–17 (1965); *Bowles* v. *Seminole Rock Co.,* 325 U.S. 410, 414 (1945).

Moreover, since Sangamon, the Commission has, on a case-by-case basis, "specifically authorized" *ex parte* contacts in some informal rulemaking proceedings and specifically prohibited them in others. *Rule Making Procedures,* 30 Fed. Reg. 9277, 5 Rad. Reg. (P&F) 2d 1701 (1965); see also *Rules Governing Ex Parte Communications, supra,* 1 FCC 2d at 51 (1965). In accordance with this practice, the *Notice of Proposed Rule Making in Docket No. 19954* expressly stated that "[i]n reaching a decision in this matter, the Commission may take into account any other relevant information before it, in addition to the comments invited by this *Notice.*" 35 FCC 2d 893, 899 (1972). Contrary to the court's contention, there is just nothing "cryptic" about this sentence.[52] The Commission clearly said that it might consider *ex parte* material in deciding the pay cable issue, and this was understood, not only by the various private interests involved, but also by the numerous public interest representatives that did communicate with the Commission on an *ex parte* basis during the course of this porceeding.[53] Thus, the Commission has not violated its own rules, nor has it acted in a manner inconsistent with the "spirit of the Freedom of Information Act,"[54] as the court also avers.[55]

[51] The Commission had argued this same point in its brief in *Sangamon,* but to no avail.

[52] Admittedly, though, the Commission's meaning may be somewhat obscured in the truncated version of the quotation given in n. 122 of the opinion below (App. A, p. 101).

[53] The Commission listed contacts with several such entities in its submission to the court of appeals. It is not true, as the opinion below maintains, that the agency "reported [no] *ex parte* contacts from public interest intervenors other than *amicus* Geller." App. A, p. 101, n. 122.

[54] 5 U.S.C. 552(a)(2)(B).

[55] App. A, p. 101, n. 122. Furthermore, the Commission has indisputably complied with the letter of the FOIA as well, since its policy on *ex parte* contacts has been published on several occasions in the Federal Register. *Rules of Practice and Procedure, supra; Rule Making Procedures, supra; The Public and Broadcasting, supra.*

CONCLUSION

It is respectfully submitted that the petition for certiorari should be granted.

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No.

In the Supreme Court of the United States

OCTOBER TERM, 1976

76-1724

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

HOME BOX OFFICE, INC., ET AL.

PETITIONER'S APPENDIX

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Appendix A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1280 *et al.*

HOME BOX OFFICE, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, RESPONDENTS

PROFESSIONAL BASEBALL *et al.*, INTERVENORS

Petitions for Review of Orders of the Federal Communications Commission

---

Argued April 20, 1976

Decided March 25, 1977

SYLLABUS

These 15 consolidated cases challenge four orders of the Federal Communications Commission which, taken together, regulate and limit the program fare cablecasters and subscription broadcast television stations may offer to the public for a fee set on a per-program or per-channel basis. Acting under its rulemaking authority, the Commission in 1975 issued rules which prohibited pay exhibition of: (1) feature films more than three, but less than 10, years old; (2) specific sports events (*e.g.*, the World Series) shown on broadcast television

within the previous five years; (3) more than the minimum number of non-specific (*i.e.*, regular season) sports events which had not been broadcast in any of the five preceding years, and in some cases only half that number; and (4) all series programs (*i.e.*, programs with interconnected plot or substantially the same cast of principal characters). In addition, the Commission prohibited commercial advertising in conjunction with pay exhibition of programming and limited the overall number of hours of pay operation which could be devoted to sports and feature films to 90% of total pay operations. *See* 47 C.F.R. §§ 73.643, 76.225 (1975). By subsequent orders in the same rulemaking, the series programming restriction was removed and recordkeeping requirements were imposed on feature film programming. The stated purpose of these rules was to prevent competitive bidding away of popular program material from the free television service to a service in which the audience would have to pay a fee to see the same material. Such competitive bidding, or "siphoning," is said to be possible because the money received from pay viewers is significantly more for some programs than money received from advertisers to attach their messages to the same material. For this reason, even a relatively small number of pay viewers could cause a program to be siphoned regardless of the wishes of a majority of its free viewers. *Held*:

1. Review of the rulemaking record indicates that the pay cable television regulations must be considered separately from those regulating subscription broadcast television. Because the Commission has exceeded its authority over cable television in promulgating the pay cable rules and because there is no evidence to support the need for regulation of pay cable television, these rules must be vacated. Pp. 29-67.

a. The Communications Act of 1934, 47 U.S.C. § 151 *et seq.*, contains no provision expressly authorizing the Commission to regulate cable television.

The Supreme Court has nonetheless sanctioned regulation of cable television under § 2(a) of the Act, 47 U.S.C. § 152(a), but only where the ends to be achieved were "long established" in the field of broadcast television or were "congressionally approved." *See United States v. Midwest Video Corp.*, 406 U.S. 649, 667-668 (1972); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 173-176 (1968). These cases and considerations of administrative consistency further indicate that in most instances the proper test for Commission jurisdiction over pay cable television is whether the ends proposed to be achieved by Commission regulations are also well understood and consistently held ends for which broadcast television could be regulated. *See United States v. Midwest Video Corp., supra*, 406 U.S. at 667-668; *cf. Greater Boston Television Corp. v. FCC*, 143 U.S.App.D.C. 383, 394, 444 F.2d 841, 852 (1970), *cert. denied*, 403 U.S. 923 (1971). *See also Hampton v. Mow Sun Wong*, 426 U.S. 88, 116 (1976). Pp. 30-34.

b. Under the standard set out above, the Commission has exceeded its jurisdiction and its rules must be vacated as unauthorized by law insofar as they regulate cable television. Pp. 34-48.

c. Even if the Commission had jurisdiction to promulgate its anti-siphoning rules, there is no evidence in the record supporting the need for regulation. Consequently, the rules must be vacated since a "regulation perfectly reasonable and appropriate in the face of a given problem [is] highly capricious if that problem does not exist." *City of Chicago v. FPC*, 147 U.S.App.D.C. 312, 323, 458 F.2d 731, 742 (1971), *cert. denied*, 405 U.S. 1074 (1972). Pp. 48-60.

d. Moreover, although the Commission properly recognized the need to balance the benefits of regu-

lation against the detriment to unfettered competition, it proceeded incorrectly. Contrary to the Commission's position, *United States v. Southwestern Cable Co., supra,* does not sanction regulation of cable television to prevent "unfair competition," but even if it did, the "unfairness" recognized in *Southwestern Cable* is not present here. Moreover, the balance between regulation and competition is not to be resolved on the basis of legal precedent, but by a considered decision upon the record in each rulemaking. Pp. 60-67.

2. The cable television rules are inconsistent with the First Amendment. Even though substantially similar rules which applied to broadcast television were upheld by this court in *National Ass'n of Theatre Owners (NATO) v. FCC*, 136 U.S.App.D.C. 352, 420 F.2d 194 (1969), *cert. denied*, 397 U.S. 922 (1970), that case is not controlling since "differences in the characteristics of new media justify differences in the First Amendment standards applied to them." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386 (1969). Pp. 67-83.

a. The constitutional question in *NATO* was straightforward: whether a grant of a broadcast license could be conditioned on terms which made reference to the kind and content of programs being offered to the public. Phrased this way, the question was identical to that resolved in the affirmative over 25 years before *NATO* in *National Broadcasting Co. v. United States*, 319 U.S. 190, 212-217, 226-227 (1943). Although *NATO* did not itself cite *National Broadcasting Co.*, there was no need for it to break new First Amendment ground and a reading of *NATO* shows that it did not do so. The conflict among speakers using the electromagnetic spectrum which justified Commission regulation in *NATO* and *National Broadcasting Co.* is absent

from cable television, however. For this reason, the conventional justification for Commission regulation of broadcast speakers cannot be applied to regulation of cable television. Pp. 67-72.

b. The absence in cable television of the physical limitations of the electromagnetic spectrum does not automatically lead to the conclusion that no regulation of cable television is valid under the First Amendment. Because "the right of free speech * * * does not embrace a right to snuff out the free speech of others," *Red Lion Broadcasting Co. v. FCC, supra,* 395 U.S. at 387, government may adopt reasonable regulations separating broadcasters competing and interfering with each other for the same audience. In determining whether such regulations comport with the First Amendment, the proper test is that set out in *United States v. O'Brien*, 391 U.S. 367, 377 (1968). Pp. 73-77.

c. Analysis of the Commission's stated reasons for promulgating the anti-siphoning rules indicates that the rules are intended to remove a conflict between those with and those without access to pay cable television. This purpose is unrelated to the suppression of free expression as required by *O'Brien*. Nonetheless, the rules are invalid because the record here will not support the conclusion that there is in fact conflict between these groups. Moreover, the restraints imposed by the rules are greater than necessary to further any legitimate government interest, and this overbreadth is not cured by the waiver provisions associated with the rules since the procedures established for obtaining a waiver are fundamentally at odds with the standards set out in *Freedman v. Maryland*, 380 U.S. 51 (1965). Pp. 77-83.

3. During the pendency of the rulemaking proceeding before the Commission, and even after the rulemaking record was supposed to be closed while the Commission

deliberated, there were numerous *ex parte* contacts made between the parties to the rulemaking and various commissioners and Commission employees. Although this court *sua sponte* ordered the Commission to prepare and submit a list of all "*ex parte* presentations together with the details of each," it is still not possible to determine the effect of such communications on the integrity of the rulemaking. As a result, the elaborate public discussion in the dockets here under review may be a sham and a fiction. Our fundamental notions of judicial review require that reviewing courts have access to "the full administrative record" that was presumably before an agency when it exercised its discretion and promulgated rules. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-420 (1971). Where there have been frequent *ex parte* contacts, it is simply not possible to know the contents of the "full administrative record." Moreover, *ex parte* contacts violate fundamental notions of fairness implicit in due process. *Sangamon Valley Television Corp. v. United States*, 106 U.S.App.D.C. 30, 269 F.2d 221 (1959). For these reasons, it is imperative that agency officials involved in the decisional process of a rulemaking shun *ex parte* contacts on the subject matter of the rulemaking from the time a notice of proposed rulemaking issues until a final decision in the proceeding. If *ex parte* contacts nonetheless occur, the substance of the contacts must be reduced to writing and put in a public file. Pp. 84-101.

4. Rules substantially similar to the subscription broadcast television rules were affirmed by this court over six years ago in *NATO v. FCC, supra.* At that time the Commission acted on an elaborate rulemaking record containing data generated in trial operations of a subscription broadcast station at Hartford, Connecticut. It appears that few, if any, subscription stations have begun operation in the interim. Accordingly, the best information available with respect to subscription broadcast television is that reviewed in *NATO*, which has not been called into question in the instant rulemaking. For this reason, *NATO* requires affirmance of the rules promulgated in the dockets here under review to the extent that such rules apply to subscription broadcast television, subject, however, to further review upon completion of additional hearings regarding *ex parte* contacts as ordered herein. Pp. 101-104.

Remanded.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1280

HOME BOX OFFICE, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

PROFESSIONAL BASEBALL, *et al.*, INTERVENORS

No. 75-1284

METROMEDIA, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

PROFESSIONAL BASEBALL, *et al.*, INTERVENORS

No. 75-1342

HOME BOX OFFICE, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

AMERICAN BROADCASTING COMPANIES, INC., *et al.*, INTERVENORS

No. 75-1358

HOME BOX OFFICE, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

CBS, INC., *et al.*, INTERVENORS

No. 75-1430

COLUMBIA PICTURES INDUSTRIES, INC., *et al.*, PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

PROFESSIONAL BASEBALL, *et al.*, INTERVENORS

No. 75-1496

UNITED ARTISTS CORPORATION AND METRO-GOLDWYN-MAYER INC., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

PROFESSIONAL BASEBALL, *et al.*, INTERVENORS

No. 75-1555

MOTION PICTURE ASSOCIATION OF AMERICA, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

AMERICAN BROADCASTING COMPANIES, INC, *et al.*, INTERVENORS

No. 75-1785

NATIONAL ASSOCIATION OF BROADCASTERS, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

No. 75-1788

AMERICAN BROADCASTING COMPANIES, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

No. 75-1807

CBS INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, INTERVENOR

No. 75-1869

NATIONAL BROADCASTING COMPANY, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

No. 75-2129

CBS INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

No. 75-2130

AMERICAN BROADCASTING COMPANIES, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

No. 75-2131

NATIONAL ASSOCIATION OF BROADCASTERS, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

No. 75-2172

NATIONAL BROADCASTING COMPANY, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

Petitions for Review of Orders of the Federal Communications Commission

---

Argued April 20, 1976

Decided March 25, 1977

Simon H. Rifkind, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom *Stuart Robinowitz*, *Bruce S. Kaplan*, *Harry M. Plotkin*, *George H. Shapiro*, *Linda A. Cinciotta*, *Ronald A. Cass*, *Susan P. Carr*, and *Moses Silverman* were on the brief, for petitioner in Nos. 75-1280, 75-1342, and 75-1358.

Robert W. Coll, with whom *James A. McKenna, Jr.* and *Steven A. Lerman* were on the brief, for petitioner in Nos. 75-1788 and 75-2130 and for intervenor American Broadcasting Companies, Inc. in Nos. 75-1280, 75-1284, 75-1342, 75-1430, 75-1496, 75-1555, and 75-1358; also argued for all broadcasters.

Arthur Scheiner, with whom *Richard A. Solomon*, *Robert D. Hadl*, and *Richard A. Moore* were on the brief, for petitioners in No. 75-1430.

Gerald Meyer, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom *Lawrence S. Lesser* was on the brief, for petitioners in No. 75-1496.

Barry Grossman, Attorney, Deparment of Justice, with whom *Samuel R. Simon*, Attorney, Department of Justice, was on the brief, for respondent United States of America. *Robert B. Nicholson*, Attorney, Department of Justice, entered an appearance for respondent United States of America in No. 75-1785. *Lee I. Weintraub*, Attorney, Department of Justice, entered an appearance for respondent United States of America in No. 75-2172. *Carl D. Lawson*, Attorney, Department of Justice, entered an appearance for respondent United States of America.

Daniel M. Armstrong, Associate General Counsel, Federal Communications Commission, with whom *Ashton R. Hardy*, General Counsel, and *Jack David Smith*, Counsel, Federal Communications Commission, and *Frederick W. Finn*, Counsel, Cable Television Bureau, were on the brief, for respondent Federal Communications Commission. *Joseph A. Marino*, Associate General Counsel, Federal Communications Commission, at the time the record was filed, also entered an appearance for respondent Federal Communications Commission.

Curtis T. White, with whom *Frank W. Lloyd, III* was on the brief, for intervenor National Citizens Committee for Broadcasting.

Thomas J. Dougherty and *Preston R. Padden* were on the brief for petitioner in No. 75-1284.

John B. Summers and *James J. Popham* were on the brief for petitioner in Nos. 75-1785 and 75-2131.

Sidney Schreiber and *James Bouras* were on the brief for petitioner in No. 75-1555.

Joel Rosenbloom, *Peter D. Bewley*, *Stephen A. Weiswasser*, and *Lowell B. Miller* were on the brief for petitioner in Nos. 75-1807 and 75-2129 and for intervenor CBS Inc. in Nos. 75-1280, 75-1284, and 75-1358. *J. Roger Wollenberg* entered an appearance for petitioner in No. 75-1807.

Bernard G. Segal, *Corydon B. Dunham*, and *Howard Monderer* were on the brief for petitioner in Nos. 75-1869 and 75-2171.

Henry Geller filed a brief as *amicus curiae* urging reversal in Nos. 75-1280, 75-1284, 75-1342, 75-1358, 75-1430, 75-1470, 75-1496, and 75-1555.

Kenneth A. Cox, *William J. Byrnes*, and *Raymond C. Fay* filed a brief on behalf of American Mothers Committee, Inc., *et al.*, as *amici curiae*.

James F. Fitzpatrick and *Frank G. Washington* were on the brief for intervenor Professional Baseball in Nos. 75-1280, 75-1284, 75-1358, 75-1430, and 75-1496.

James A. McKenna, Jr., *Robert W. Coll*, and *Steven A. Lerman* entered appearances for intervenors Forward Communications Corporation, *et al.*, in Nos. 75-1280, 75-1284, 75-1358, 75-1430, 75-1496, and 75-1555.

Arthur Scheiner entered an appearance for intervenor Twentieth Century-Fox Film Corporation.

Before WRIGHT and MACKINNON, *Circuit Judges*, and WEIGEL,* *District Judge*.

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* Of the United States District Court for the Northern District of California, sitting by designation pursuant to 28 U.S.C. § 292(d) (1970).

PER CURIAM:[1] In these 15 cases, consolidated for purposes of argument and decision, petitioners challenge various facets of four orders of the Federal Communications Commission which, taken together, regulate and limit the program fare "cablecasters" [2] and "subscription broadcast television stations" [3] may offer to the public for a fee set on a per-program or per-channel basis.[4]

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[1] The opinion in this case is issued as a *per curiam*, not because it has received less than full consideration by the court, but because the complexity of the issues raised on appeal made it useful to share the effort required to draft this opinion among the members of the panel.

[2] "Cablecasting" refers to the origination of programming on a cable television system, in contradistinction to the retransmission of signals that have been received over the air from conventional broadcast television stations. *See* 47 C.F.R. §§ 76.5(v)-(x) (1975). The rules challenged here apply to both "access" cablecasters, who lease (or are given) channel time from cable system operators, *id.* § 76.5(x), and "origination" cablecasters, who are system operators, *id.* § 76.5(w). *Id.* § 76.225. The rules challenged here apply only to cablecasting on systems which also carry broadcast signals. *See id.* §§ 76.5(a), 76.225. Although some petitioners have argued that the rules should be extended to all cablecasters, we think the Commission has given a rational basis for this distinction. *See First Report and Order*, 52 FCC 2d 1, 47-48 (1975), JA 71-72.

[3] Subscription broadcast television stations are those with the technical capability to broadcast programs "intended to be received in intelligible form by members of the public only for a fee or charge." 47 C.F.R. § 73.641(b) (1975).

[4] Jurisdiction over these petitions for review is based on 47 U.S.C. § 402 (1970) and 28 U.S.C. § 2342 (1970).

In addition to the four orders promulgating, modifying, or refusing to waive the "anti-siphoning" rules, petitioner Home Box Office, Inc. and *amicus* Henry Geller request that we order the Commission to complete its "program exclusivity" proceedings. "Program exclusivity" refers to an alleged broadcast network practice of obtaining exclusive exhibition

Technically, the orders reviewed here amend previous, more stringent, Commission rules.[5] While this proce-

rights against cablecasters. This problem was apparently first brought to the attention of the Commission in 1971 and it issued a notice of proposed rulemaking at that time. *See Notice of Proposed Rule Making*, 27 FCC 2d 13 (1971) (Docket 18179). No further action appears to have been taken in this docket. The issue was raised again in the proceeding here under review, Docket 19554. The issue was not decided in the *First Report and Order*, *supra* note 2. Instead, a "Notice of Inquiry" was issued, 52 FCC 2d 87 (1975), JA 111, establishing Docket 20402, a proceeding in which the issue was to be resolved. Almost 18 months have passed since issuance of this notice and over a year since the close of the comment period. Yet we are unaware that any action has been taken by the Commission. We agree with the Commission in Docket 19554 that the use of exclusivity clauses "raise[s] anti-trust questions," *Further Notice of Proposed Rule Making and Order for Oral Argument*, 48 FCC 2d 453, 462 n.16 (1974), JA 18. In view of this, and in view of the potentially deleterious effect of exclusivity on the interest of viewers in having the greatest possible access to diverse sources of information, we think the Commission should by now have terminated its deliberations. Therefore, we today enter an order "compel[ling] agency action * * * unreasonably delayed." 5 U.S.C. § 706(1) (1970).

[5] In FCC Docket 18397 rules originally developed for application to subscription broadcast television were applied to pay cablecasting. 20 FCC 2d 201 (1969). Petitions for reconsideration of this order were filed with the Commission by many of the parties here. *See Notice of Proposed Rule Making and Memorandum Opinion and Order*, 35 FCC 2d 893, 894 n.5 (1972), JA 2. These petitions were denied. *Id.* at 899, JA 7. At the same time, however, the Commission instituted further rulemaking with regard to pay cablecasting under new Docket 19554. In *In re Home Box Office, Inc.*, 51 FCC 2d 317 (1975), JA 141, which is also on review here, the Commission took the view that the rules adopted as a result of the rulemaking in Docket 18397 were final and binding and would not be waived. *See* 51 FCC 2d at 321, JA 145. We disagree with this interpretation, however. *See* note 27 *infra*.

[continued]

dural nicety has not gone unnoticed by those petitioners who attack only the amendments to the rules on the theory that they represent a major, but unexplained and hence arbitrary, change of prior Commission policy,[6] it

The subscription broadcast television rules were adopted by the Commission in Docket 11279, *see Fourth Report and Order*, 15 FCC 2d 466 (1968). These rules were affirmed by this court in *National Ass'n of Theatre Owners (NATO) v. FCC*, 136 U.S.App.D.C. 352, 420 F.2d 194 (1969), *cert. denied*, 397 U.S. 922 (1970). Subsequently the Commission entertained petitions for amendment of its subscription television and pay cable rules as they related to sports. *Notice of Proposed Rule Making*, 35 FED. REG. 11040 (1970) (Docket 18893). One order was entered in this docket, *Report and Order*, 34 FCC 2d 271 (1972), which amended the subscription television sports rule. Petitions for reconsideration were filed in this proceeding, and consideration of these petitions was granted and consolidated with the further consideration of pay cable rules announced in Docket 19554. *See Notice of Proposed Rule Making and Memorandum Opinion and Order*, *supra*, 35 FCC 2d at 898, JA 6. The rules promulgated in the *First Report and Order*, *supra* note 2, constitute the Commission's decision on reconsideration of its earlier *Report and Order* in Docket 18893. The *First Report and Order* terminated Docket 18893. *See* 52 FCC 2d at 68, JA 92. Subsequently, however, the Commission issued its *Second Report and Order* in Docket 19554, —— FCC 2d ——, 35 P & F RADIO REG. 2D 767 (1975), JA 131, which repealed 47 C.F.R. § 76.225(e), and the Commission took the view in that *Order* that it could repeal the equivalent subscription broadcast television section of its regulations, 47 C.F.R. § 73.643(g), as well. *See* —— FCC 2d ——, JA 139. Such an extension is technically in violation of the Administrative Procedure Act, 5 U.S.C. § 553(b) (1970), because the broadcast inquiry was terminated and the *Second Further Notice of Proposed Rule Making*, 52 FCC 2d 83 (1975), JA 197, entered after the *First Report*, *supra*, made no reference to broadcast television. No party has raised an objection to this procedure, and we think that, given the similarity of the issues and parties involved, this was harmless error. *See* 5 U.S.C. § 706 (1970).

[6] This group includes the major broadcast networks, the National Association of Broadcasters, and one group of *amici*.

has largely escaped those who take the opposing view that any regulation exceeds the authority of the Commission.[7] We accept neither view in full but instead uphold the orders challenged here insofar as they relate to subscription broadcast television and vacate the orders as arbitrary, capricious, and unauthorized by law in all other respects.

I. The Factual Background

At the heart of these cases are the Commission's "pay cable" rules, set out in the margin for convenience.[8]

[7] This view is taken by the Justice Department, the cable television interests, producers of programs suitable for showing on either cable or broadcast television, and a group of *amici*.

[8] Cable television system operators or channel lessees engaging in origination or access cablecasting operations for which a per-program or per channel charge is made shall comply with the following requirements:

(a) Feature films shall not be cablecast by a cable television system subject to the mandatory signal carriage requirements of Subpart D of this Part 76, except as provided in this paragraph.

(1) A feature film may be cablecast if—

(i) The film has been in general release in theaters anywhere in the United States for three (3) years or less prior to its proposed cablecast;

(ii) A conventional television broadcast station licensed in the market of the cable television system holds a present contractual right to exhibit the film. For purposes of this subdivision, a television station affiliated with a television network will be deemed to hold a present contractual right to exhibit a film if the network to which it is affiliated holds such a right;

(iii) The film has been in general release in theaters anywhere in the United States for more than ten (10) years prior to its proposed cablecast and the film has not

been exhibited in the market of the cable television system over conventional television for three (3) years prior to its proposed cablecast. Once a film has been cablecast in the market pursuant to this subdivision, or broadcast on a subscription basis pursuant to § 73.643(a)(1)(iii), such film may thereafter be cablecast in the market without regard to its subsequent exhibition over conventional television;

(iv) The film is in a foreign language;

(2) Feature films otherwise excluded by this para-g[r]aph may be cablecast upon a convincing showing to the Commission that they are not desired for exhibition over conventional television in the market of the cable television system, or that the owners of the broadcast rights to the films, even absent the existence of subscription television, would not make the films available to conventional television.

(3) Every cable television system operator or channel lessee engaging in origination or access cablecasting pursuant to this paragraph shall maintain, or cause to be maintained, for public inspection a file listing the title of the film, the date on which it was cablecast and the provision of this paragraph pursuant to which it was cablecast. When a feature film is cablecast pursuant to paragraph (a)(1)(ii) of this section, the station or network serving the market and holding a present contractual right to exhibit the film shall be specified. These files shall be retained for a period of two years.

(b) Sports events shall not be cablecast live by a cable television system subject to the mandatory signal carriage requirements of Subpart D of Part 76, except as provided in this paragraph.

(1) A specific event may be cablecast if the event has not been broadcast live over conventional television in the market of the cable television system during any one of the five (5) seasons preceding the proposed cablecast. If a regularly recurring event takes place at intervals of more than one year (e.g., summer Olympic games), the event shall not be cablecast if it has been broadcast live over conventional television in the market during

any one of the ten (10) years preceding the proposed cablecast.

(2) New specific sports events that result from the restructuring of existing sports shall not be cablecast until five (5) seasons after their first occurrence. Thereafter, subscription cablecasts shall be governed by paragraph (b) (1) of this section.

(3) The number of non-specific events which may be cablecast in any given season shall be determined as follows:

(i) If less than twenty-five (25) percent of the events in a category of non-specific events were broadcast live over conventional television in the market of the cable television system during each of the five (5) seasons preceding the proposed cablecast, the number of events in the category cablecast shall not exceed the number of events in the category not broadcast in that season among the preceding five (5) seasons when the largest number of events in the category were broadcast.

(ii) If twenty-five (25) percent or more of the events in a category of non-specific events were broadcast live over conventional television in the market of the cable television system during any one of the five (5) seasons preceding the proposed cablecast, the number of events in the category cablecast shall not exceed fifty (50) percent of the number of events in the category not broadcast in that season among the preceding five (5) seasons when the largest number of events in the category were broadcast. However, if the number of events in the category to be broadcast in the current season is a reduction from the number of events broadcast in that season among the preceding five (5) seasons when the largest number of events in the category were broadcast, the number of events in the category which may be cablecast pursuant to this subparagraph shall be reduced in proportion to the reduction in events broadcast.

(c) Not more than ninety (90) percent of the total cablecast programming hours shall consist of feature films and sports events combined. The percentage calculations may be made on a yearly basis, but absent a showing of good cause, the percentage of such programming hours

The effect of these rules is to restrict sharply the ability of cablecasters to present feature film and sports programs if a separate program or channel charge is made for this material. In addition, the rules prohibit cablecasters from devoting more than 90 percent of their cablecast hours to movie and sports programs and further bar cablecasters from showing commercial advertising on cable channels on which programs are presented for a direct charge to the viewer.[9] Virtually identical restrictions apply to subscription broadcast television.[10]

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may not exceed ninety-five (95) percent of the total cablecast programming hours in any calendar month.

(d) No commercial advertising announcements shall be carried on subscription channels during such operations except before and after such programs for promotion of other programs for which a per-program or per-channel charge is made.

47 C.F.R. § 76.225 (1975), *as amended by Second Report and Order, supra* note 5.

[9] Commercial advertising on cablecast channels not used for subscription cablecasting was also, at one time, restricted by the Commission. *See* 47 C.F.R. § 74.1117 (1969), *deleted*, 39 FED. REG. 43310 (1974).

[10] Subscription television broadcast programming shall comply with the following requirements:

(a) Feature films shall not be broadcast except as provided in this paragraph.

(i) A feature film may be broadcast if —

(i) The film has been in general release in theaters anywhere in the United States for three (3) years or less prior to its proposed broadcast;

(ii) A conventional television broadcast station licensed in the market of the subscription television broadcast station holds a present contractual right to exhibit the film. For purposes of this subdivision, a television station affiliated with a television network will be deemed

to hold a present contractual right to exhibit a film if the network to which it is affiliated holds such a right;

(iii) The film has been in general release in theaters anywhere in the United States for more than ten (10) years prior to its proposed subscription broadcast and the film has not been exhibited over conventional television in the market of the subscription television broadcast station for three (3) years prior to its proposed subscription broadcast. Once a film has been broadcast in the market pursuant to this subdivision or cablecast on a subscription basis pursuant to § 76.225(a)(1)(iii), such film may thereafter be broadcast on a subscription basis in the market without regard to its subsequent exhibition over conventional television;

(iv) The film is in a foreign language;

(2) Feature films otherwise excluded by this paragraph may be broadcast upon a convincing showing to the Commission that they are not desired for exhibition over conventional television in the market or that the owners of the broadcast rights to the films, even absent the existence of subscription television, would not make the films available to conventional television.

(3) Every subscription television broadcast station over which a feature film is broadcast pursuant to this paragraph shall maintain for public inspection a file listing the title of the film, the date on which it was broadcast and the provision of this paragraph pursuant to which it was broadcast. When a feature film is broadcast pursuant to subparagraph (1)(ii) of this paragraph, the station or network, serving the market and holding a present contractual right to exhibit the film shall be specified. These files shall be retained for a period of two years.

(b) Sports events shall not be broadcast live except as provided in this paragraph.

(1) A specific event may be broadcast if the event has not been broadcast live over conventional television in the market of the subscription television broadcast station during any one of the five (5) seasons preceding the proposed subscription broadcast. If a regularly recurring event takes place at intervals of more than one year (e.g.,

summer Olympic games), the event shall not be broadcast on a subscription basis if it has been broadcast live over conventional television in the market of the subscription television broadcast station during any one of the ten (10) years preceding the proposed subscription broadcast.

(2) New specific sports events that result from the restructuring of existing sports shall not be broadcast on a subscription basis until five (5) seasons after their first occurrence. Thereafter, subscription broadcasts shall be governed by paragraph (b)(1) of this section.

(3) The number of non-specific events which may be broadcast on a subscription basis in any given season shall be determined as follows:

(i) If less than twenty-five (25) percent of the events in a category of non-specific events were broadcast live over conventional television in the market of the subscription television broadcast station during each of the five (5) seasons preceding the proposed subscription broadcast, the number of events in the category broadcast on a subscription basis shall not exceed the number of events in the category not conventionally broadcast in that season among the preceding five (5) seasons when the largest number of events in the category were broadcast over conventional television.

(ii) If twenty-five (25) percent or more of the events in a category of non-specific events were broadcast live over conventional television in the market of the subscription television broadcast station during any one of the five (5) seasons preceding the proposed subscription broadcast, the number of events in the category broadcast on a subscription basis shall not exceed fifty (50) percent of the number of events in the category not broadcast in that season among the preceding five (5) seasons when the largest number of events in the category were broadcast over conventional television. However, if the number of events in the category to be broadcast over conventional television in the current season is a reduction from the number of events broadcast in that season among the preceding five (5) seasons when the largest number of events in the category were broadcast, the number of events in the category which may be broadcast on a sub-

To understand the function of these rules, it is useful to trace their origins.

The first application to establish a subscription broadcast television service was filed with the Commission in 1952.[11] After a series of administrative proceedings and hearings before Congress,[12] the Commission announced in 1959 that it would license a number of trial systems in order to gather information about the technical and

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scription basis pursuant to this subparagraph shall be reduced in proportion to the reduction in events broadcast over conventional television.

(c) No commercial advertising announcements shall be carried during subscription television operations except for promotion of subscription television broadcast programs before and after such programs.

(d) Not more than 90 percent of the total subscription programming hours shall consist of feature films and sports events combined. The percentage calculations may be made on a yearly basis, but, absent a showing of good cause, the percentage of such programming hours may not exceed 90 percent of the total subscription programming hours in any calendar month.

(e) Any television broadcast station licensee or permittee authorized to broadcast subscription programs shall broadcast in addition to its subscription broadcasts, at least the minimum hours of nonsubscription programming required by § 73.651.

(f) Except as they may be otherwise waived by the Commission in authorizations issued hereunder, the rules and policies applicable to regular television broadcast stations are applicable to subscription television operations.

47 C.F.R. § 73.643 (1975), *as amended by Second Report and Order, supra* note 5.

[11] *See* 20 FED. REG. 988 n.1 (1955).

[12] *See generally NATO v. FCC, supra* note 5, 136 U.S.App. D.C. at 354, 420 F.2d at 196.

economic aspects of subscription television.[13] In its *Fourth Report and Order*, 15 FCC 2d 466, issued in 1968, the Commission analyzed in detail results achieved in the Hartford, Connecticut trial system and concluded that permanent subscription operations should be authorized with certain limitations.

For present purposes, the relevant limitations included restrictions on feature films, sports events, and series programs that could be shown for a fee, and prohibited commercial advertising during subscription operations.[14] The purpose of these limitations was twofold. First, the Commission had agonized over both its authority to dedicate one or more channels from the electronic spectrum to subscription operations and the desirability of doing so. Such channels are scarce, and opponents of subscription television had argued that they should be used for conventional programming which would, of course, be free to all viewers.[15] The Commission ultimately concluded that it had the required authority,[16] a position sustained by this Court in *National Ass'n of Theatre Owners (NATO) v. FCC*, 136 U.S.App.D.C. 352, 420 F.2d 194 (1969), *cert. denied*, 397 U.S. 922 (1970), but that subscription service would not be desirable unless the programming presented was distinct from that on conventional advertiser-supported television.[17] As a result, the Commission placed restrictions on the number of hours of feature films and sports programs, both readily avail-

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[13] *Third Report*, 26 FCC 265 (1959), *aff'd, Connecticut Committee Against Pay TV v. FCC*, 112 U.S.App.D.C. 248, 301 F.2d 835, *cert. denied*, 371 U.S. 816 (1962).

[14] *See* 15 FCC 2d at 597-598.

[15] *See generally Fourth Report and Order, supra* note 5, 15 FCC 2d at 466-488.

[16] *See First Report*, 23 FCC 532, 536-540 (1957).

[17] *See Fourth Report, supra* note 5, 15 FCC 2d at 483-488.

able on conventional television, that could be shown and prohibited commercial advertising in an effort to remove any economic pressure to appeal to a mass audience, a pressure to which the Commission attributed the sameness of conventional television fare.[18] A second reason for restricting the feature films, sports events, and series programs that could be shown on subscription television was the Commission's fear that the revenue derived from subscription operations would be sufficient to allow subscription operators to bid away the best programs in these categories, thus reducing the quality of conventional television.[19] By limiting the subscription operator to material that would not otherwise be shown on television, the Commission hoped both to prevent such "siphoning" [20] and to enhance the diversity of program offerings on broadcast television as a whole.

The cable television industry has a similarly lengthy technical and regulatory history. Starting in the 1940's as community antenna television systems (CATV) designed to bring better or more distant broadcast signals into the home, cable systems developed through the 1960's into media with enough channels to accommodate both retransmission of broadcast television programs and origination of special services such as weather or stock exchange reports.[21] More recently, cable companies began cablecasting their own programs on channels not used

[18] *See id.* at 474-488, 564-566. *See also First Report and Order, supra* note 2, 52 FCC 2d at 43, JA 67; *Report and Order*, 23 FCC 2d 382, 391-392 (1970) (Docket 12782).

[19] *See Fourth Report, supra* note 5, 15 FCC 2d at 554-573.

[20] In these proceedings the Commission has changed its vocabulary from the pejorative "siphoning" to the more neutral term "migration." *See* Transcript of Oral Argument at 56, 57, 59.

[21] *See* CABINET COMM. ON CABLE COMMUNICATIONS, REPORT TO THE PRESIDENT 10-11 (1974).

for retransmission services, and the abundance of channels on modern systems (presently 35 or more) [22] promises that program origination will remain an important part of cable programming.

The Commission's regulation of cable television reflects its technological development. At first the Commission eschewed regulation altogether.[23] However, as CATV systems with multiple channels developed, the Commission asserted jurisdiction over cable operations to prevent fragmentation of audiences and revenues between local broadcasters and competing cable systems which were bringing distant broadcast signals into local markets.[24] In 1968 the Commission launched a further, broad-ranging inquiry into the uses to which cable television might be put in the national communications network.[25] The outcome of these proceedings was a series of regulations which, among other things, required cable systems in major markets to provide cablecasting services, to set aside "access channels" on which members of the public could rent time to produce and transmit their own shows, and to furnish channels for government and educational use.[26] The Commission specifically declined, however, to promulgate rules for cable television similar to those

[22] *See* Transcript of Oral Argument at 43; br. for petitioner Home Box Office at 9.

[23] *See* CABINET COMM. ON CABLE COMMUNICATIONS, *supra* note 21, at 10.

[24] *See generally United States v. Southwestern Cable Co.*, 392 U.S. 157, 161-168 (1968).

[25] *Notice of Proposed Rulemaking and Notice of Inquiry*, 15 FCC 2d 417 (1968).

[26] *First Report and Order*, 20 FCC 2d 201, 223-225 (1969). The Commission also extended the equal time, sponsorship identification, and fairness doctrines to cable television in this *Order*.

adopted for subscription broadcast television. *See First Report and Order*, 20 FCC 2d 201, 204 (1969). The reasons given were that the Commission had no information which would indicate that pay cable television could penetrate any television market to the extent needed to "siphon" programming, *see id.* at 204 & n.4, and that the Commission would in any event be able to act in time to correct any adverse effects on conventional broadcasting, *see id.* at 204.

Nine months later the Commission reversed its course and applied the rules developed in the subscription broadcast field to cable television. *See Memorandum Opinion and Order*, 23 FCC 2d 825 (1970). The reasons for such a quick reversal are not clear in the *Order*, and a number of the petitioners here filed petitions to reconsider imposition of the subscription broadcast rules on the ground that the Commission's abrupt change of course was arbitrary and not adequately explained. *See Notice of Proposed Rule Making and Memorandum Opinion and Order*, 35 FCC 2d 893, 894 n.5 (1972), JA 2. These petitions for reconsideration were denied. *See id.* at 899, JA 7. In this same order Docket 19554, which spawned the orders reviewed here, was established.[27] In its *First*

[27] Many parties to this proceeding, *see, e.g.*, br. for respondent United States; br. for petitioner Home Box Office, Inc., including the Commission itself, *see* br. for respondent FCC, have presented arguments predicated on an assumption that it is appropriate for this court to review the validity of the pay cablecasting rules *de novo*, although other parties, *see, e.g.*, br. of petitioner American Broadcasting Companies, Inc., appear to take the position that only the rather limited question of the validity of the relaxation of prior Commission rules is before this court. No party has addressed this problem expressly, although the Commission, in *In re Home Box Office, Inc., supra* note 5, 51 FCC 2d at 321, JA 145, takes the position that the rules promulgated in its *Memorandum Opinion and Order* in

Docket 18397, 23 FCC 2d 825 (1970), are final. Upon review of the record, we hold today that, as to pay cablecasting, the rules are before us for *de novo* consideration.

The critical question is the effect of the Commission's *Notice of Proposed Rule Making and Memorandum Opinion and Order*, 35 FCC 2d 893 (1972), JA 1. In that *Order* the Commission, after surveying points raised by the petitions for reconsideration before it (some of which were addressed to procedural infirmities and others to the substance of the *Memorandum Opinion and Order* in Docket 18397, *supra*), stated:

> 8. * * * [I]n view of the importance of the issue as against the paucity of prior comment and the indication that additional opportunity for comment *will elicit useful new material*, we have decided to issue a further *Notice of Proposed Rule Making* so that we may hear from all parties concerned and *to reconsider the rules*.
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> * * * *
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> 10. In light of our decision to allow for further comment on the pay-cablecasting rules, we think it unnecessary to comment at length on the [substantive] issues raised in the reconsideration pleadings. * * *

35 FCC 2d at 896, 897-898, JA 4, 5-6 (emphasis added). Nonetheless, the Commission, "[i]n accordance with" the above quoted paragraphs, denied the petitions for reconsideration of its *Memorandum Opinion and Order* in Docket 18397. *Id.* at 899, JA 7.

We think such a disposition is fundamentally at odds with the purpose of reconsideration as envisioned by § 405 of the Communications Act, 47 U.S.C. § 405 (1970), and is also contrary to the Commission's own rules, 47 C.F.R. § 1.106 (1975). Section 405 of the Communications Act provides in relevant part:

> * * * The filing of a petition for rehearing shall not be a condition precedent to judicial review of any * * * order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission * * * has been afforded no opportunity to pass. The Commission * * * shall enter an order, with a concise statement of the reasons therefor, denying a

petition for rehearing or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate. * * *

The obvious purpose of § 405 is to afford the Commission an opportunity to consider and pass upon matters prior to their presentation to the court. *Joseph v. FCC*, 131 U.S.App.D.C. 207, 210, 404 F.2d 207, 210 (1968); *Gerico Investment Co. v. FCC*, 99 U.S.App.D.C. 379, 380, 240 F.2d 410, 411 (1957); *see Saginaw Broadcasting Co. v. FCC*, 68 App.D.C. 282, 286, 96 F.2d 554, 558, *cert. denied*, 305 U.S. 613 (1938). To hold, as the Commission has done here, that further consideration of its order is needed but that the order is nonetheless final for purposes of judicial review is to thwart this fundamental purpose of § 405. Moreover, had a party taken an immediate appeal from the *Notice of Proposed Rule Making and Memorandum Opinion and Order, supra*, this court would in all likelihood have deferred consideration of that appeal until the Commission had finished its reconsideration of the rules in order to have the benefit of the further proceedings. *See Wrather-Alvarez Broadcasting, Inc. v. FCC*, 101 U.S.App.D.C. 324, 327, 248 F.2d 646, 649 (1957). Finally, the "concise statement of reasons" given by the Commission here is tantamount to the statement: "We have denied your petitions for reconsideration because you have raised such serious issues that we think the rules need to be reconsidered." Surely, denial on these grounds is arbitrary, capricious, and in clear contravention of the purposes of § 405.

We need not rely on § 405 alone, however, because the Commission's own procedural rules disallow the disposition of the petitions for reconsideration made here. As we read § 1.106 of those rules, the Commission may dispose of petitions for reconsideration in only three ways. First, it may deny the petitions. 47 C.F.R. § 1.106(j) (1975). Second, it may grant a petition and make a ruling on its merits in the same order. *Id.* § 1.106(k)(1). Third, it may grant a petition but defer its ruling on the merits until after further proceedings. *Id.* § 1.106(k)(2). Here, however, the Commission has taken a fourth course—instituting further proceedings in order to rule on the merits of the petitions for reconsideration, but also denying the petitions. In contrast, in the same *Notice of Proposed Rule Making and Memorandum Opinion and Order* the Commission adopted the procedure set out in § 1.106(k)(2) with regard to its proceedings on subscription broadcast tele-

Report and Order in this docket, 52 FCC 2d 1 (1975), JA 25, the Commission re-adopted, with minor modifications, the pay cable rules originally announced. Petitions for reconsideration of this *Report and Order* were denied, except to the extent that some petitioners sought to establish reporting requirements designed to enhance enforcement of the rules. *Memorandum Opinion and Order*, 54 FCC 2d 797 (1975), JA 117. Contemporaneously the Commission issued a *Second Further Notice of Proposed Rule Making*, 52 FCC 2d 83 (1975), JA 107, eliciting additional information on the rules relating to

vision. *See* 35 FCC 2d at 899, JA 7. We think the proper procedure here too would have been that set out in § 1.106(k)(2), and we therefore hold that the Commission's order with respect to pay cablecasting must be read to be consistent with that section. In accordance with § 1.106(k)(2), therefore, we further hold that the orders entered in Docket 19554 are the rulings on the merits of the petitions for reconsideration.

Although we would normally be hesitant to decide the merits of an appeal where the briefs of the parties indicate a fundamental confusion over the issues open on appeal, we do not think that our disposition of the procedural posture of this case is prejudicial to any of the parties before us. Although we do not have the benefit of a record of the proceedings in Docket 18397, which would normally be part of the record on an appeal from the grant of a motion to reconsider, the Commission has itself commented on the "paucity" of information in that record. *See* 35 FCC 2d at 896, JA 7. Moreover, many of the parties who took the position that the issue here was relaxation of prior rules in fact made arguments that were relevant only if the issue was *de novo* reconsideration. Furthermore, the Commission itself adequately represented those who would defend the rules on *de novo* review.

For all foregoing reasons, we hold that the effect of our ruling today is to remove *in toto* all regulations of the Commission—now codified at 47 C.F.R. § 76.225 (1975)—regulating program formats on pay cable television.

series programming.[28] On the basis of that information the Commission deleted any restriction on subscription use of series programs. *Second Report and Order*, —— FCC 2d ——, 35 P & F RADIO REG. 2d 767 (1975), JA 131.[29]

To understand the postulated "siphoning" phenomenon and its potential harm, it is useful to consider the structure of the television industry today. In 1975 there were 70.1 million American homes with television sets, of which 9.8 million had access to some cable system.[30] Although the number of cable subscribers is large, individual cable systems are quite small, with the largest having only 101,000 customers[31] and with only 224 of approximately 3,405 systems having more than 10,000 subscribers.[32] The number of homes that presently have access to pay cable facilities is about a half million and is growing rapidly.[33] Most of these homes are located outside major television markets, with the exception of the New York City area and parts of California.[34] Extension of service to other urban areas might be accomplished at a capital cost of some $8 billion, but lay-

[28] Series programs are those "with interconnected plot or substantially the same cast of principal characters." 47 C.F.R. § 76.225(c), *deleted by Second Report and Order, supra* note 5.

[29] *See also* note 5 *supra*.

[30] STAFF OF SUBCOMM. ON COMMUNICATIONS OF HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, CABLE TELEVISION: PROMISE VERSUS REGULATORY PERFORMANCE 11 (1976) (Subcomm. Print) (hereinafter cited as PROMISE VERSUS PERFORMANCE).

[31] *Id.* at 19.

[32] *Id.* at 17.

[33] Transcript of Oral Argument at 4, 27.

[34] *Id.* at 77.

ing cable to reach that half of the American population which lives in rural areas would by any estimate be extremely expensive, perhaps requiring an additional $240 billion.[35] Because of these capital requirements, extension of cable service with cablecasting capability to the country as a whole does not seem possible in the immediate future.

Similarly, access of all Americans to cable seems foreclosed by the cost of cable service. Cable service charges are generally separated into two distinct fees, one basic fee entitling the viewer to receive only broadcast signals, the other entitling the viewer to see cablecast programs as well. The basic fee is approximately $5-$6 monthly.[36] Technical capability exists today to distribute and bill for cablecast programs on a program-by-program basis, but this is not currently done. Instead a single fee of $5-$7 monthly, in addition to the basic fee, is charged for access to the cablecasting channels.[37] Nonetheless, as the name of one petitioner suggests, it is quite literally possible to turn the home receiver into a "Home Box Office," thereby marketing television features in much the same way that movies are marketed in theaters today. As with other box offices, however, only those with enough money to buy a ticket can get in to see the show.

Siphoning is said to occur when an event or program currently shown on conventional free television is purchased by a cable operator for showing on a subscription cable channel. If such a transfer occurs, the Commission believes, the program or event will become unavailable for showing on the free television system or its showing on free television will be delayed (since the commercial

[35] *Id.* at 26.

[36] PROMISE VERSUS PERFORMANCE, *supra* note 30, at 17.

[37] *First Report and Order, supra* note 2, 52 FCC 2d at 2, JA 26.

appeal of the cable showing is the assurance of earlier access to program material, an assurance that might itself be brought about by agreement between the seller of the program or event and the subscription cablecaster).[38] In either case a segment of the American people—those in areas not served by cable or those too poor to afford subscription cable service—could receive delayed access to the program or could be denied access altogether. The ability of the half-million cable subscribers thus to preempt the other 70 million television homes is said to arise from the fact that subscribers are willing to pay more to see certain types of features than are advertisers to spread their messages by attaching them to those same features. For example, according to Commissioner Robinson,[39] subscribers may be willing to pay 15 to 30 cents per viewing hour for the privilege of viewing a recent feature film, while advertisers are willing to pay only three cents per viewer. As a result a pay audience of one million could routinely buy a film away from a nonpaying audience of five to ten million.

Whether such a siphoning scenario is in fact likely to occur and, if so, whether the result of siphoning would be to lower the quality of free television programming available to certain areas of the country or to certain economic strata of the population are matters of great dispute among the Commission and the various petition-

[38] The position of the Commission is not clear. The concern in the subscription television proceeding was that material shown on subscription television would simply become unavailable for conventional viewing. *See Fourth Report and Order, supra* note 5, 15 FCC 2d at 494-509. Here, at least with regard to feature films, the Commission seems to have identified the evil to be avoided as delay in showing a film on conventional television. *See First Report and Order, supra* note 5, 52 FCC 2d at 49-50 (¶ 162), JA 73-74.

[39] *First Report and Order, supra* note 5, 52 FCC 2d at 77 (dissenting opinion), JA 101.

ers and intervenors seeking review of the Commission's regulations in this case. Other petitioners both here and before the Commission argue that the rules which ostensibly place cable in a subordinate role in order to increase program diversity—a goal which has been basic to a number of Commission regulations[40]—in fact diminish diversity by prohibiting subscription cable operators from showing the programs that are most likely to be the financial backbone of a successful cable operation. As a result, it is claimed, cultural and minority programming that could otherwise "piggyback" on a cable system supported by more broadly popular fare is precluded. Indeed, some petitioners argue that the subscription broadcast television rules had the effect of killing that medium in its infancy by denying it access to necessary programming—a charge supported by the apparent lack of any viable commercial applications of subscription broadcast television today and left unrefuted by the Commission—and urge us not to let the Commission similarly snuff out pay cable. Finally, other petitioners take the position that the threat of siphoning is very real and that the Commission's rules do not adequately cope with this threat to conventional television service.

II. Pay Cable Rules

A. *Statutory Authority*

In determining the Commission's authority to promulgate the pay cable rules, we by no means write on a clean slate. This court has recognized that the Communications Act of 1934, 47 U.S.C. § 151 *et seq.*, must be construed at least in some circumstances to allow the Commission to regulate cable television system opera-

[40] *E.g.*, 47 C.F.R. § 76.201 (1974) (origination requirements), *removed*, 39 FED. REG. 43310 (1974); 47 C.F.R. § 73.658 (prime time access regulations).

tions. *See Carter Mountain Transmission Corp. v. FCC*, 116 U.S.App.D.C. 93, 321 F.2d 359, *cert. denied*, 375 U.S. 951 (1963); *Buckeye Cablevision, Inc. v. FCC*, 128 U.S.App.D.C. 262, 387 F.2d 220 (1967). This view has been adopted by other Courts of Appeals, *see, e.g., American Civil Liberties Union v. FCC*, 523 F.2d 1344, 1351 (9th Cir. 1975), and confirmed by the Supreme Court, *see United States v. Midwest Video Corp.*, 406 U.S. 649 (1972); *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968). As the Supreme Court explained in *Southwestern Cable, supra*, to construe the Communications Act narrowly would be to defeat the purpose of Congress " 'to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission.' " 392 U.S. at 172, *quoting FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940). Yet, despite the latitude which must be given the Commission to deal with evolving technology, its regulatory authority over cable television is not a *carte blanche*. Unless these regulations are "justified by reasons which are properly the concern of [the Commission]," *Hampton v. Mow Sun Wong*, 426 U.S. 88, 116 (1976), they must be set aside.

1. *The Standard for Determining Statutory Authority*

Midwest Video Corp. and *Southwestern Cable Co.* hold that the Commission may only exercise authority over cable television to the extent "reasonably ancillary" to the Commission's jurisdiction over broadcast television. *United States v. Southwestern Cable Co., supra*, 392 U.S. at 178; *United States v. Midwest Video Corp., supra*, 406 U.S. at 670. *See generally National Ass'n of Regulatory Utility Comm'rs v. FCC*, 174 U.S.App.D.C. 374, 379-380, 394-395, 401-406, 533 F.2d 601, 606-607, 621-622, 628-633 (1976). This standard was first enunciated in *Southwestern Cable Co.*, in which the Supreme Court was asked to pass on the Commission's authority to promulgate rules prohibiting importation of "distant signals" [41] into the San Diego television market. 392 U.S. at 159-160. The purpose of these rules was to prevent division of audiences and revenues between cable television and fledgling UHF and educational television stations. Competition by cable operators, the Commission feared, would make these new ventures unprofitable, thereby frustrating the Commission's long-standing [42] and congressionally approved [43] policy of attempting to provide locally controlled broadcast television service. *See* 392 U.S. at 173-177.

In finding that the Commission was authorized to promulgate the challenged rules, the *Southwestern* Court first held that cable television was an instrument of "interstate and foreign communication by wire or radio" within the meaning of Section 2(a) of the Communications Act of 1934, 47 U.S.C. § 152(a) (1970). 392 U.S. at 167-169. For this reason the Commission was held to have "regulatory authority" over cable television. *Id.* at 173. However, the Court chose not "to determine in detail the limits of the Commission's authority to regulate

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[41] Distant signals are those which a viewer would not ordinarily be able to receive without the assistance of a community antenna television system.

[42] *See United States v. Southwestern Cable Co., supra* note 24, 392 U.S. at 174-176 & n.43. *See generally* R. NOLL, M. PECK & J. MCGOWAN, ECONOMIC ASPECTS OF TELEVISION REGULATION 99-108 (1973).

[43] The *Southwestern* Court referred a number of times to instances of congressional approval of the Commission's policy of local control of broadcasting. *See* 392 U.S. at 173 & n.38; *id.* at 174 & n.39; *cf. id.* at 175-176 n.43. The Court also referred to congressional support for the Commission's policy of encouraging UHF development, and read legislation requiring television receivers shipped in interstate commerce to have UHF capability, Pub. L. No. 87-529, 76 STAT. 150 (1962), as support for the Commission's restrictions on cable. *See* 392 U.S. at 175 & nn.41 & 42.

[cable television]" under Section 2(a). *Id.* at 178. Instead, stressing that "'the achievement of an agency's ultimate purposes'" was at stake, *id.* at 177, *quoting Permian Basin Area Rate Cases*, 390 U.S. 747, 780 (1968), the Court noted that the rules were "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting," *id.* at 178, and that to carry out such responsibilities the Commission could "issue 'such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law' as 'public convenience, interest, or necessity requires.'" *Id.*, *quoting* 47 U.S.C. § 303(r) (1970).

In *United States v. Midwest Video Corp.*, *supra*, a decision which affirmed the Commission's jurisdiction by a narrow margin, a four-judge plurality of the Supreme Court again applied the "reasonably ancillary" standard to determine the scope of the Commission's jurisdiction over cable television operations. Upholding the Commission's rules requiring operators of large cable systems to cablecast programs on some channels, the plurality reiterated that Section 2(a) conferred regulatory power on the Commission, but that "§ 2(a) does not in and of itself prescribe any objectives for which the Commission's regulatory power over [cable television] might properly be exercised." 406 U.S. at 661. The plurality then stated that the test for determining whether a rule reflected a proper objective was whether it would "'further the achievement of long-established regulatory goals in the field of television broadcasting.'" *Id.* at 667-668, *quoting United States v. Southwestern Cable Co.*, *supra*, 392 U.S. at 654. Under this standard the Commission was held to be authorized to require cable program origination since such a requirement furthered Commission policies with respect to both enhancement of local service and diversification of control of available television and cable programming. *See* 406 U.S. at 668-670.

The deciding vote in *Midwest Video Corp.* was cast by Chief Justice Burger, who wrote:

> Candor requires acknowledgment, for me at least, that the Commission's position strains the outer limits of even the open-ended and pervasive jurisdiction that has evolved by decisions of the Commission and the courts. * * *

406 U.S. at 676. Nonetheless, the Chief Justice was willing to uphold the challenged regulations on the ground that "when [cable system operators] interrupt the signal and put it to their own use for profit, they take on burdens, one of which is regulation by the Commission." *Id.*[11] Justice Douglas, writing for four dissenting Justices, took yet a third position, apparently agreeing that the appropriate test for Commission jurisdiction was expressed by the "reasonably ancillary" standard, but finding that to uphold the regulations challenged in *Midwest* would "make the Commission's authority over activities 'ancillary' to its responsibilities greater than its authority over any broadcast licensee." *Id.* at 681.

The Supreme Court's opinions in *Southwestern Cable Co.* and *Midwest Video Corp.* thus look in two directions. First, they recognize an expansive jurisdiction for the Commission based on Section 2(a) of the Communications Act and the need to give the Commission sufficient latitude to cope with technological developments in a rapidly changing field. But the opinions are also narrow. Even the broadest opinion, that of the plurality in *Midwest Video Corp.*, recognizes that the Commission can act only for ends for which it could also regulate broadcast tele-

[11] Were one to accept the Chief Justice's theory of jurisdiction, the Commission's rules would have to be set aside with respect to access cablecasters, *see* note 2 *supra*, who rent time from those who "interrupt the signal," since there is no evidence in this record that these independent entrepreneurs are in any way subsidized by cable system owners who are the only legal entities offering retransmission services.

vision. Indeed, even this standard will be too commodious in certain cases, since as we discuss in Part III *infra* the scope of the Commission's constitutionally permitted authority over broadcast television in areas impinging on the First Amendment is broader than its authority over cable television. Finally, the opinions in both cases go no farther than to allow the Commission to regulate to achieve "long-established" goals or to protect its "ultimate purposes." That these cases establish an outer boundary to the Commission's authority we have no doubt, *cf. National Ass'n of Regulatory Utility Comm'rs v. FCC*, *supra*; STAFF OF SUBCOMM. ON COMMUNICATIONS, COMM. ON INTERSTATE AND FOREIGN COMMERCE, CABLE TELEVISION: PROMISE VERSUS REGULATORY PERFORMANCE 80-83 (1976) (Subcomm. Print), and if judicial review is to be effective in keeping the Commission within that boundary, we think the Commission must either demonstrate specific support for its actions in the language of the Communications Act or at least be able to ground them in a well-understood and consistently held policy developed in the Commission's regulation of broadcast television, *cf. Greater Boston Television Corp. v. FCC*, 143 U.S.App.D.C. 383, 394, 444 F.2d 841, 852 (1970), *cert. denied*, 403 U.S. 923 (1971).*

2. *Applying the Jurisdictional Standard*

The purpose of the Commission's pay cable rules is to prevent "siphoning" of feature film and sports material from conventional broadcast television to pay cable.[45] Al-

* Judge MacKinnon is of the view that the FCC's jurisdiction to regulate cablecasting in the interests of the broadcasting industry is restricted to instances where the cable stations substantially rely on broadcast signals or their activities amount to unfair competition.

[45] As promulgated in the *First Report and Order*, *supra* note 2, the rules also applied to series programming. Since the rules have subsequently been amended to delete series programming restrictions, *see* note 28 *supra*, we do not deal with this aspect of the rules here.

though there is dispute over the effectiveness of the rules, it is clear that their thrust is to prevent *any* competition by pay cable entrepreneurs for film or sports material that either has been shown on conventional television or is likely to be shown there.[46] How such an effect furthers any legitimate goal of the Communications Act is not clear. The Commission states only that its "mandate to act in the public interest requires that [it] strive to maintain the public's ability to receive the informational and entertainment programming now provided by conventional television at no direct cost," *First Report and Order*, *supra*, 52 FCC 2d at 43, JA 67, and that its action "is designed to enhance the integrity of broadcast signals and is a proper execution of our responsibility under Section 2(b) [*sic*] of the Communications Act * * *," *id.* at 45, JA 69.

Insofar as the Commission places reliance on such conclusory phrases as "enhance the integrity of broadcast signals," we think it has crossed "the line from the tolerably terse to the intolerably mute." *Greater Boston Television Corp. v. FCC*, *supra*, 143 U.S.App.D.C. at 394, 444 F.2d at 852. Beneath such generalities, however, the Commission seems to be making two more specific arguments which relate the public interest to retention of the conventional television structure. First, the Commission appears to take the position that it has both the

[46] *See, e.g., First Report and Order*, *supra* note 2, 52 FCC 2d at 51-55, JA 75-79. This position is most clearly expressed in the Commission's standard for waiving its film rules:

> [W]aivers will be granted upon a convincing showing to the Commission that a film desired for subscription exhibition is not desired for exhibition over conventional television in the market, or that the owner of the film, even absent the existence of subscription television, would not make the film available to conventional television.

Id. at 55, JA 79.

obligation and the authority to regulate program format content to maintain present levels of public enjoyment. For this reason, and because the Commission also seems to assert that the overall level of public enjoyment of television entertainment would be reduced if films or sports events were shown only on pay cable or shown on conventional television only after some delay, it concludes that anti-siphoning rules are both needed and authorized. Second, and closely related, is the argument pressed here by counsel for the Commission that Section 1 of the Communications Act, 47 U.S.C. § 151 (1970), mandates the Commission to promulgate anti-siphoning rules since cable television cannot now and will not in the near future provide a nationwide communications service. *See* Transcript of Oral Argument at 57-58. Before considering each of these arguments in turn, we note that we do *not* understand the Commission to be asserting that subscription cable television will divide audiences and revenues available to broadcast stations in such a manner as to put the very existence of these stations in doubt. *See Memorandum Opinion and Order, supra*, 54 FCC 2d at 800-802 (¶¶ 10, 11, 18), JA 120-122; *Second Report and Order, supra*, —— FCC 2d at ——, 35 P & F RADIO REG. 2D at 772, JA 136 ("[w]e possess no evidence which indicates that the advertising revenues generated by conventional television will be diminished as a result of subscription operations"). *See also First Report and Order*, 20 FCC 2d 201, 216-217 (1969). The Supreme Court's opinion in *Southwestern Cable Co.* is not, therefore, directly applicable.

The question of the Commission's obligation or authority to regulate television to maintain public enjoyment is one whose analysis takes us into a thicket of disagreement between this court and the Commission. *See Citizens Committee to Save WEFM v. FCC*, 165 U.S. App.D.C. 185, 191-207, 506 F.2d 246, 252-268 (1974) (*en banc*). Although this controversy has taken place in the context of the Commission's obligation to regulate

changes in radio broadcast formats, much of what has been said is directly relevant here."[47] The traditional view of the Commission is well summarized by its then chairman, Dean Burch:

> It would be a simple matter for the Commission to dictate to each licensee of the 62 stations in the Chicago area which entertainment format each should use. Such an approach might maximize—at least in the short run—the diversity of formats and types of programming available to the public. But it would not be the approach contemplated by Congress when it created the Commission in 1934. Broadcast stations are, of course, licensed to serve the public interest, but as the Supreme Court observed back in 1940, the Communications Act also "recognizes that the field of broadcasting is one of free competition." In short, "[t]he regulatory responsibility of the Commission in the broadcast field essentially involves the maintenance of a balance between the preservation of a free competitive broadcast system, on the one hand, and the reasonable restriction of that freedom inherent in the public interest standard provided in the Communications Act, on the other."
>
> The Commission has struck this balance by requiring licensees to conduct formal surveys to ascertain the need for certain types of non-entertainment programming, while allowing licensees wide discretion in the area of entertainment programming. Thus with respect to the provision of news, public affairs, and other informational services to the community, we have required that broadcasters conduct thorough surveys designed to assure familiarity with community problems and then develop

[47] The Communications Act does not expressly regulate television. Title III of the Act, which covers radio broadcasting, has been construed to cover television because § 3(b) of the Act, 47 U.S.C. § 153(b) (1970), defines "radio communication" to include transmission of pictures.

> programming responsive to those identified needs. In contrast, we have generally left entertainment programming decisions to the licensee or applicant's judgment and competitive marketplace forces. As the Commission stated in its *Programming Policy Statement*, 25 Fed. Reg. 7293 (1960), "[o]ur view has been that the station's [entertainment] program format is a matter best left to the discretion of the licensee or applicants, since as a matter of public acceptance and of economic necessity he will tend to program to meet the preferences of his area and fill whatever void is left by the programming of other stations."

Zenith Radio Corp., 40 FCC 2d 223, 230 (1973) (footnotes omitted).[48] In addition, in many other proceedings the Commission has taken the position that the First Amendment and the anti-censorship provision of the Communications Act, 47 U.S.C. § 326 (1970), strip it of any authority to require or to prohibit broadcast of any particular material. *See, e.g., Ad Hoc Comm. on the Sugar Bowl*, 29 P & F RADIO REG. 2D 70 (1973); *Broadcast of Elections Projections*, 38 FCC 2d 378 (1972); *Washington Women's Strike for Peace*, 6 P & F RADIO REG. 2D 307, 308 (1965). As we understand the traditional position of the Commission, therefore, it is that regulation of entertainment program format is inconsistent with the Communications Act and is also unnecessary, but for reasons inapposite here.

In *WEFM* this court *en banc* rejected the *laissez faire* approach of the Commission, holding:

> There is a public interest in a diversity of broadcast entertainment formats. The disappearance of a distinctive format may deprive a significant segment

[48] These views were not those of the Commission as a whole, but of only six commissioners. Nonetheless, the Commission as a whole has cited approvingly the argument quoted in text. *See Notice of Inquiry*, 57 FCC 2d 580, 580-581 (1976).

> of the public of the benefits of radio, at least at their first-preference level. When faced with a proposed license assignment encompassing a format change, the FCC is obliged to determine whether the format to be lost is unique or otherwise serves a specialized audience that would feel its loss. If the endangered format is of this variety, then the FCC must affirmatively consider whether the public interest would be served by approving the proposed assignment, which may, if there are substantial questions of fact or inadequate data in the application or other officially noticeable materials, necessitate conducting a public hearing in order to resolve the factual issues or assist the Commission in discerning the public interest. Finally, it is not sufficient justification for approving the application that the assignor has asserted financial losses in providing the special format; those losses must be attributable to the format itself in order logically to support an assignment that occasions a loss of the format.

165 U.S.App.D.C. at 201, 506 F.2d at 262. Our position is thus unmistakable: The Communications Act not only allows, but in some instances requires, the Commission to consider the preferences of the public, and the Commission in discharging this authority must regulate the entertainment programming which station owners can present whenever a significant segment of the public is threatened with the loss of a preferred broadcast format.* Were *WEFM* the last word, it is at least possible that the Commission could promulgate the anti-siphoning rules under the theory of jurisdiction recognized by the plurality in *Midwest Video Corp.*, since the end to be achieved—protection of preferred television service for

* Judge MacKinnon is of the view that *Citizens Committee to Save WEFM v. FCC*, 165 U.S.App.D.C. 185, 506 F.2d 246 (1974), constitutes a binding decision of this court, but he continues to adhere to the views he expressed in dissent when that decision issued. 165 U.S.App.D.C. at 224, 506 F.2d at 285.

those not served by cable television—would also justify regulation of the broadcast media.[49]

The Commission has not, however, acquiesced in *WEFM*. Instead, it recently launched and concluded a proceeding on "Changes in the Entertainment Formats of Broadcast Stations." *See Notice of Inquiry*, 57 FCC 2d 580 (1976); *Memorandum Opinion and Order*, 60 FCC 2d 858 (1976). Its conclusions there bear repeating in some detail. First, the Commission has reiterated its conclusion that it has no statutory authority to dictate entertainment formats. Format regulation, it is argued, is analogous to imposing common carrier responsibilities on broadcasters. Since Section 3(h) of the Communications Act, 47 U.S.C. § 153(h) (1970), specifically excludes broadcasters from the category of "common carriers," "Congress intentionally refrained from extending the full range of regulatory tools deemed appropriate for

[49] While *WEFM* offers some support for the Commission's authority to promulgate anti-siphoning rules, the application of *WEFM* to cable television requires thought and argument going beyond anything said in that case. The facts of *WEFM* made it a particularly appropriate case for Commission intervention. At stake was a classical music format provided by only one other station in WEFM's service area. 165 U.S. App.D.C. at 193, 506 F.2d at 254. On the other hand, the "contemporary music" format proposed for WEFM was already supplied in whole or in part by 13 of the Chicago area's 61 radio broadcast stations. *Id.* at 193 n.4, 506 F.2d at 254 n.4. In these circumstances, retention of WEFM's classical format raised no serious question of depriving other viewers of their favored formats and the proposed format change would only have added to an apparent surfeit of contemporary and rock music. Certainly a different case would have been presented were fewer stations involved (raising an issue of conflicts among the first preferences of viewers) or had WEFM proposed to offer another format in scarce supply.

In addition, even if *WEFM* did provide statutory authority to the Commission to act as it has here, the constitutionality of the jurisdiction thus conferred is a wholly separate issue, to be analyzed under the principals set out in Part III *infra*.

common carrier regulation to the field of broadcast regulation." *Memorandum Opinion and Order*, *supra*, 60 FCC 2d at 859. In particular, "Congress did not enact [a] requirement that broadcasters receive Commission authority to commence or discontinue programming, including program format services, offered to the public." *Id.* This conclusion is further supported, in the Commission's view, by *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973), and *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940). *See* 60 FCC 2d at 860-861. A second point relevant here is the Commission's professed inability to determine the boundaries of a "particular entertainment format." *Id.* at 862. "The Commission does not know, as a matter of indwelling administrative expertise, whether a particular format is 'unique' or, indeed, assuming that it is, whether it has been deviated from by a licensee." *Id.* In any case, concludes the Commission, "[i]t is impossible to determine whether consumers would be better off [with any particular format] without reference to the actual preferences of real people." *Id.* at 864.

If the Commission's own recently announced standards are applied to the rules challenged here, it seems clear that the rules cannot stand. The very essence of the feature film and sports rules is to require the permission of the Commission "to commence * * * programming, including program format services, offered to the public." However, it has been the consistent position of the Commission itself that cablecasters, like broadcasters, are not to be regulated as common carriers, a view sustained by a number of courts. *See, e.g., American Civil Liberties Union v. FCC*, *supra*, 523 F.2d at 1344; *Philadelphia Television Broadcasting Co. v. FCC*, 123 U.S. App.D.C. 298, 359 F.2d 282 (1966). Moreover, given the similarities between cablecasting operations and broadcasting, we seriously doubt that the Communications Act could be construed to give the Commission "regulatory tools" over cablecasting that it did not have over broad-

In analyzing the feature film and sports rules under the standards announced by the Commission in its broadcast format change proceeding, we do not wish to imply that we have reconsidered the position of this court in *WEFM*.[51] The sole purpose of undertaking this analysis is to demonstrate that the Commission has, in this proceeding, seemingly backed into an area of regulation in which it would not assert jurisdiction were it to face the issues directly. Indeed, in this very proceeding, and despite the Commission's definition of current quantity and quality levels of films and sports events as the minimum level consistent with adequate television service, there is no indication that the Commission is prepared to require *broadcasters* to continue to present material presently on conventional television. *See* br. for respondent United States at 23; reply br. for petitioner Motion Picture Association of America at 3-4. In the absence of this court's opinion in *WEFM*, these unexplained inconsistencies in agency policy would require us to set aside the Commission's rules and remand the case to the agency to allow it to "supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." *Greater Boston Television Corp. v. FCC*, *supra*, 143 U.S.App. D.C. at 394, 444 F.2d at 852; *accord, New Castle County Airport Comm'n v. CAB*, 125 U.S.App.D.C. 268, 270, 371 F.2d 733, 735 (1966), *cert. denied*, 387 U.S. 930 (1967). Because we understand the Commission's *Memorandum Opinion and Order* in the format change proceeding to constitute a request to this court to reconsider its position in *WEFM*, *see* 60 FCC 2d at 865-866, and because

[51] As we have already indicated, *see* note 49 *supra*, *WEFM* only lends support to Commission jurisdiction and does not control it. Accordingly, there is no need for us to reconsider *WEFM*. Moreover, we decline to consider whether *WEFM* should be extended into the cable television context since the Commission itself has argued that *WEFM* should be confined rather than extended.

casting. *See* pages 33-34 *supra*. Thus, even if the siphoning rules might in some sense increase the public good, this consideration alone cannot justify the Commission's regulations. *See generally Hampton v. Mow Sun Wong*, *supra*.

In addition, the record before us is devoid of any "reference to the actual preferences of real people." While we would be willing to concede that certain formats, such as the World Series, are sufficiently unique and popular that a factual inquiry into actual preferences might not be required, this would not seem to be the case with either feature films or "non-specific" sports events.[50] Moreover, there is not even speculation in the record about what material would replace that which might be "siphoned" to cable television. Without such a comparative inquiry, we do not understand how the Commission could define the current level of programming as a baseline for adequate service. Finally, with regard to feature films we question how the Commission, which has stated that it has no criteria by which to distinguish among formats, could have determined that feature films are a sufficiently unique format to warrant protection. The record demonstrates that broadcasters are increasingly substituting made-for-television movies—for which "siphoning" is not a problem since the broadcasters own the copyrights—for feature films. *See, e.g., First Report and Order*, *supra*, 52 FCC 2d at 26, JA 50. The inference from this would seem to be that the Commission has drawn its categories too narrowly and that a feature film rule may not really be necessary to ensure broadcast presentation of popular movie material. Whether or not this is the case, the inference is certainly too strong to be dismissed, as the Commission has done here, without discussion.

[50] Non-specific sports events are essentially those that occur during regular season play. *See First Report and Order*, *supra* note 2, 52 FCC 2d at 59, JA 33.

we are hesitant to approve rules which seem inconsistent with the Commission's best thinking in a closely analogous area, we think we should not affirm the feature film and sports regulations on the basis of *WEFM*.

Before reaching a conclusion on whether remand is necessary, however, we must consider the Commission's second theory of jurisdiction.[52] Our analysis is hampered by the failure of the Commission to make clear its argument that Section 1 of the Communications Act,[53] as interpreted by this court in *NATO v. FCC*, *supra*, requires rules against "siphoning" of material away from free television. In the subscription broadcast proceeding the petitioning theater owners sought to block that part of the Commission's subscription television rules which permitted subscription television by arguing that Section 1 of the Act prohibited the Commission from withdrawing one channel from the broadcast spectrum for use by only the few who might be willing to pay for the privilege of receiving broadcast signals. *See First Report*, 23 FCC 532, 536-540 (1957). The Commission, in dismissing such an interpretation of the Act, stated:

> [Section 1 has] been relied on in support of an argument to the effect that the Act did not contemplate or permit, and in fact bars authorization by the

[52] In large part this argument appears to be a *post hoc* rationalization of counsel which, of course, could not provide a basis for sustaining the Commission. *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-169 (1962).

[53] Section 1 provides in relevant part:

> For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, * * * there is created a commission to be known as the "Federal Communications Commission" * * *.

47 U.S.C. § 151 (1970).

> Commission of a program service, by broadcast stations, which would be available only to such members of the public as were able and willing to pay a charge. We believe, however, that such a construction cannot reasonably be made of these excerpts. Section 1 states the general purposes of the Act in broad terms. The reference to "all the people of the United States" does not, for example, preclude licensing the use of radio frequencies for the safety and special radio services. Frequencies so allocated are not available to all the people of the United States. While the words "at reasonable charges" evidently refer to the Commission's regulation of rates charged by common carriers for message communications, and does not, presumably, refer to charges for programs disseminated over broadcast stations, it may be noted that this express reference to charges is unaccompanied by any prohibitive language concerning charges for programs transmitted by broadcast stations.

Id. at 538. In *NATO* this court, after reviewing the legislative history of the Communications Act, 136 U.S. App.D.C. at 358-360, 420 F.2d at 200-202, agreed, finding that the Act did not prohibit licensing of subscription television services, but was indeed "designed to foster diversity in the financial organization and *modus operandi* of broadcasting stations as well as in the content of programs * * *." 136 U.S.App.D.C. at 360, 420 F.2d at 202. Thus, as interpreted by both this court and the Commission, Section 1 does not itself compel the Commission to protect conventional advertiser-supported television broadcasting.

However, counsel for the Commission at oral argument appeared to be making a second argument about the meaning of Section 1. Stressing that Section 1 also mentions that the Commission is to foster "Nation-wide"

service,[54] counsel argued that cable could not be a nationwide service in the reasonably foreseeable future and that "siphoning" would, therefore (the logic behind this "therefore" is by no means clear), destroy nationwide service in contravention of the policy of Section 1. *See* Transcript of Oral Argument at 57-58. We need not consider whether Section 1 can be so construed since counsel's argument is nothing more than a naked allegation, unsupported in the record. Indeed, the Commission has nowhere spelled out even a theory of the dynamic which could result in loss of broadcast television service to regions not served by cable. Nor is such a dynamic readily apparent. For example, cablecasters are unlikely to withhold feature film and sports material from markets they do not serve since broadcast of this material in such markets could not reduce the potential cable audience and because exhibition rights to this material would undoubtedly have substantial value. In these circumstances, the postulated loss of regional service is too speculative to support jurisdiction. *See City of Chicago v. FPC*, 147 U.S.App.D.C. 312, 323, 458 F.2d 731, 742 (1971), *cert. denied*, 405 U.S. 1074 (1972).

Finally, none of the suggested bases for Commission jurisdiction justifies imposition of the no-advertising[55]

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[54] *See* note 53 *supra*.

[55] No commercial advertising announcements shall be carried on subscription channels during such operations except before and after such programs for promotion of other programs for which a per-program or per-channel charge is made.

47 C.F.R. § 76.225(e) (1975), *as amended by Second Report and Order*, —— FCC 2d ——, 35 P & F RADIO REG. 2D 767 (1975).

and 90-percent[56] rules on cable television. These rules evolved out of the subscription broadcast television proceeding, *see Fourth Report and Order*, *supra*, 15 FCC 2d at 484, and were retained here apparently because they raised "little dissent." *See First Report and Order*, *supra*, 52 FCC 2d at 66, JA 90. The reasons for which these rules were adopted in the subscription television proceeding are not applicable here, however. In the subscription proceeding the Commission determined that the public interest would not be served if one of very few available broadcast channels was allocated to subscription television unless subscription television offered services distinct from conventional advertiser-supported broadcasting. *See* 15 FCC 2d at 484. To ensure such a "supplemental" role for subscription television, advertising was prohibited and the broadcast time that could be allocated to sports and feature films—which were already available on conventional television—was limited to 90 percent of subscription broadcast time. When these rules were reviewed by this court, it was again in the context of a need to allocate scarce spectrum resources. *See NATO v. FCC*, *supra*, 136 U.S.App.D.C. at 365-366, 420 F.2d at 207-208. Such an allocation problem is clearly not involved in this case. Moreover, given the abundance of channels that cable systems can carry, plus the Commission's rules[57] requiring governmental, educational, and public access channels on every cable system carrying broadcast signals, we do not understand the need to

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[56] Not more than ninety (90) percent of the total cablecast programming hours shall consist of feature films and sports events combined. * * *

47 C.F.R. § 76.225(d) (1975), *as amended by Second Report and Order*, —— FCC 2d ——, 35 P & F RADIO REG. 2D 767 (1975).

[57] 47 C.F.R. §§ 76.251, 76.253 (1975).

restrict feature film and sports programming time to create the technical conditions for diversity. Without further explanation of the function these rules are meant to serve, we cannot affirm the Commission's authority to promulgate them.

Although we hold today that the Commission has not established its jurisdiction on the record evidence before it, we think it important to note the limits of our holding. We do not hold that the Commission must find express statutory authority for its cable television regulations. Such a holding would be inconsistent with the nature of the FCC's organic Act and the flexibility needed to regulate a rapidly changing industry. However, we do require that at a minimum the Commission, in developing its cable television regulations, demonstrate that the objectives to be achieved by regulating cable television are also objectives for which the Commission could legitimately regulate the broadcast media. Where the First Amendment is involved, more will be required. *See* Part III *infra*. Further, we require that the Commission state clearly the harm which its regulations seek to remedy and its reasons for supposing that this harm exists. Because our holding is so limited, it is possible that the Commission will, after remand, be able to satisfy the jurisdictional prerequisites for regulating pay cable television. In order to avoid multiple remands, therefore, we will now consider other objections raised against these rules.

B. *The Evidence*

1. *Standard of Review*

With the exception of the Commission's ruling in *In re Home Box Office, Inc.*, 51 FCC 2d 317 (1975), JA 141, each of the orders challenged here is the product of rulemaking under Section 303 of the Communications Act,

47 U.S.C. § 303 (1970). Because the statute does not otherwise indicate, this rulemaking is also informal rulemaking governed by Section 4 of the Administrative Procedure Act (APA), 5 U.S.C. § 553 (1970), *see id.* § 553 (a); *Ethly Corp. v. EPA*, —— U.S.App.D.C. ——, ——, 541 F.2d 1, 33-34 (1976) (*en banc*), and the appropriate standard of review is that set out in Section 10 of the APA, 5 U.S.C. § 706(2)(A)-(D) (1970), *see Ethyl Corp. v. EPA, supra*, —— U.S.App.D.C. at ——, 541 F.2d at 33-34; *National Ass'n of Food Chains, Inc. v. ICC*, —— U.S.App.D.C. ——, ——, 535 F.2d 1308, 1313-1314 (1976). *See generally* Pedersen, *Formal Records and Informal Rulemaking*, 85 YALE L. J. 38 (1975); Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375 (1974).

We have recently had occasion to review at length our obligation to set aside agency action which is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law * * *." 5 U.S.C. § 706(2)(A), *see Ethyl Corp. v. EPA, supra*, —— U.S.App.D.C. at ——, 541 F.2d at 33-37, and for this reason we need not labor our aanlysis here. It is axiomatic that we may not substitute our judgment for that of the agency. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). Yet our review must be "searching and careful," *id.*, and we must ensure both that the Commission has adequately considered all relevant factors, *see id.*, and that it has demonstrated a "rational connection between the facts found and the choice made," *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

Equally important, an agency must comply with the procedures set out in Section 4 of the APA. *Citizens to*

Preserve Overton Park, Inc. v. Volpe, supra, 401 U.S. at 417. The APA sets out three procedural requirements: notice of the proposed rulemaking, an opportunity for interested persons to comment, and "a concise general statement of [the] basis and purpose" of the rules ultimately adopted. 5 U.S.C. § 553(b)-(c). As interpreted by recent decisions of this court, these procedural requirements are intended to assist judicial review as well as to provide fair treatment for persons affected by a rule. *See Portland Cement Ass'n v. Ruckelshaus*, 158 U.S.App.D.C. 308, 326-327, 486 F.2d 375, 393-394 (1973), *cert. denied*, 417 U.S. 921 (1974); *International Harvester Co. v. Ruckelshaus*, 155 U.S.App.D.C. 411, 445, 478 F.2d 615, 649 (1973); *Automotive Parts & Accessories Ass'n v. Boyd*, 132 U.S.App.D.C. 200, 208, 407 F.2d 330, 338 (1968). *See also* Wright, *supra*, 59 CORNELL L. REV. at 380-381. To this end there must be an *exchange* of views, information, and criticism between interested persons and the agency. *See Portland Cement Ass'n v. Ruckelshaus, supra*, 158 U.S.App.D.C. at 326-327, 486 F.2d at 393-394; *cf. National Nutritional Foods Ass'n v. Weinberger*, 512 F.2d 688, 701 (2d Cir.), *cert. denied*, 423 U.S. 827 (1975). Consequently, the notice required by the APA, or information subsequently supplied to the public, must disclose in detail the thinking that has animated the form of a proposed rule and the data upon which that rule is based. *Portland Cement Ass'n v. Ruckelshaus, supra*, 158 U.S.App.D.C. at 325-327, 486 F.2d at 392-394; *International Harvester Co. v. Ruckelshaus, supra*, 155 U.S.App.D.C. at 445, 478 F.2d at 649. Moreover, a dialogue is a two-way street: the opportunity to comment is meaningless unless the agency responds to significant points[58] raised by the public. *Portland Cement Ass'n v. Ruckelshaus, supra*, 158 U.S.App.D.C. at 326-327, 486 F.2d at 393-394. A response is also mandated by *Overton Park*, which requires a reviewing court to assure itself that all relevant factors have been considered by the agency. *See* 401 U.S. at 416; *accord, Duquesne Light Co. v. EPA*, 522 F.2d 1186, 1196 (3d Cir. 1975), *vacated on other grounds*, —— U.S. ——, 96 S.Ct. 3185 (June 28, 1976).

[58] In determining what points are significant, the "arbitrary and capricious" standard of review must be kept in mind. Thus only comments which, if true, raise points relevant to the agency's decision and which, if adopted, would require a change in an agency's proposed rule cast doubt on the reasonableness of a position taken by the agency. Moreover, comments which themselves are purely speculative and do not disclose the factual or policy basis on which they rest require no response. There must be some basis for thinking a position taken in opposition to the agency is true. *See Portland Cement Ass'n v. Ruckelshaus*, 158 U.S.App.D.C. 308, 326-327, 486 F.2d 375, 393-394 (1973).

From this survey of the case law emerge two dominant principles. First, an agency proposing informal rulemaking has an obligation to make its views known to the public in a concrete and focused form so as to make criticism or formulation of alternatives possible. Second, the "concise and general" statement that must accompany the rules finally promulgated

> must be accommodated to the realities of judicial scrutiny, which do not contemplate that the court itself will, by a laborious examination of the record, formulate in the first instance the significant issues faced by the agency and articulate the rationale of their resolution. * * * [The record must] enable us to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did.

Automotive Parts & Accessories Ass'n v. Boyd, supra, 132 U.S.App.D.C. at 208, 407 F.2d at 388; *accord, National Nutritional Foods Ass'n v. Weinberger, supra*, 512 F.2d at 701; *Pillai v. CAB*, 158 U.S.App.D.C. 239, 244-252, 485 F.2d 1018, 1023-1031 (1973); *National Air*

Carriers Ass'n v. CAB, 141 U.S.App.D.C. 31, 44-45, 436 F.2d 185, 198-199 (1970); *cf. Camp v. Pitts*, 411 U.S. 138, 142-143 (1973); *Citizens to Preserve Overton Park, Inc. v. Volpe*, *supra*, 401 U.S. at 420.

2. *Applying the Standard*

(a) *The Need for Regulation*

At the outset, we must consider whether the Commission has made out a case for undertaking rulemaking at all since a "regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist." *City of Chicago v. FPC*, *supra*, 147 U.S.App.D.C. at 323, 458 F.2d at 742. Here the Commission has framed the problem it is addressing as

> how cablecasting can best be regulated to provide a beneficial supplement to over-the-air broadcasting without at the same time undermining the continued operation of that "free" television service.

Notice of Proposed Rule Making and Memorandum Opinion and Order, *supra*, 35 FCC 2d at 898, JA 6. To state the problem this way, however, is to gloss over the fact that the Commission has in no way justified its position that cable television must be a supplement to, rather than an equal of, broadcast television. Such an artificial narrowing of the scope of the regulatory problem is itself arbitrary and capricious and is ground for reversal. *See Pillai v. CAB*, *supra*, 158 U.S.App.D.C. at 248, 485 F.2d at 1027. Moreover, by narrowing its discussion in this way the Commission has failed to crystallize what is in fact harmful about "siphoning." Sometimes the harm is characterized as selective bidding away of programming from conventional television, *see First Report and Order*, *supra*, 52 FCC 2d at 49, JA 73, sometimes delay, *see id.* at 50, JA 74, and sometimes (perhaps) the financial collapse of conventional broadcasting, *compare id.* at 45, JA 69, *with Second Report and Order*, *supra*, —— FCC 2d at ——, 35 P & F RADIO REG. 2D at 772, JA 136. As a result, informed criticism has been precluded and formulation of alternatives stymied.[59]

Setting aside the question whether siphoning is harmful to the public interest, we must next ask whether the record shows that siphoning will occur. The Commission assures us that siphoning is "real, not imagined." *First Report and Order*, *supra*, 52 FCC 2d at 50, JA 74. We find little comfort in this assurance, however, because the Commission has not directed our attention to any comments in a voluminous record which would support its statement. Moreover, whatever evidence the Commission thought it had was self-admittedly insufficient to give it a "clear picture as to the effects of subscription television upon conventional broadcasting."[60] *Id.* at 49, JA

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[59] This deficiency was brought to the attention of the Commission by, among others, the Justice Department:

> [B]efore the question posed [as to the existence of alternatives] can be answered, the Commission must define exactly what *public interests* it seeks to protect. Until such a determination is made, the Commission cannot conclude whether there exists a "less restrictive" means of serving the public interest. To date, the Commission has not demonstrated exactly what public interest it advances by retarding pay cablecasting.

Comments of the Department of Justice in Docket No. 19554, at 26, JA 251 (Nov. 1, 1972) (emphasis in original).

[60] The Commission's lack of a clear picture is directly attributable to its own choice to regulate rather than allow a period of unregulated experimentation in which data could be generated that could form a predicate for informed agency action. This decision was taken over the objections of a number of parties to this proceeding. *See, e.g.*, Reply Comments of the United States Department of Justice in Docket No. 19554, at 13, JA 280 (Oct. 4, 1974); Comments of Walter S. Baer, Henry Geller, and Leland L. Johnson Docket No. 19554, at 11-14, JA 293-296 (Sept. 20, 1974). The sole basis

73. Our own review of the *First Report* and the joint appendix filed in these cases suggests that, if there is any evidentiary support at all, it is indeed scanty. As to the potential financial power of cable television we are left to draw the inference from two facts—that championship boxing matches often appear only on closed-circuit television in theaters and that Evel Knievel chose to televise his jet-cycled dive into the Snake River in the same fashion—and a series of mathematical demonstrations. *See id.* at 9, JA 33. *See also Memorandum Opinion and Order, supra*, 23 FCC 2d at 828 n.6 (Docket 18397) (reliance on mathematical demonstration). While the former may be directly relevant to siphoning of what the Commission has characterized as "specific" sports events, it is not at all clear what light they shed on the question of who

for the Commission's choice to go forward is the conclusory statement that action was needed at a "'time when it involves no disruption of existing patterns.'" *First Report and Order, supra* note 2, 52 FCC 2d at 49, JA 73, *quoting Memorandum Opinion and Order*, 23 FCC 2d 825, 828 (1970) (Docket 18397). However, this position is precisely the opposite of that the Commission took in its *First Report and Order* in Docket 18397, 20 FCC 2d 201 (1969), *see* notes 5 & 27 *supra*. There the Commission expressly refused to impose regulations like those challenged here until it gained "some further experience in this area." *Id.* at 204. In particular, the Commission noted that there was no "trend calling for action in the public interest," *id.*, and that the data developed in the subscription broadcast television proceeding was not apposite, *id.* The Commission has not called our attention to any data which would fill the gaps in its experience identified in 1969, and we can find none in the record.

In this state of affairs, where there is no evidence of any urgent need for preventive action and where approval of the Commission's position would foreclose the possibility that data could be generated in the future that would allow fully informed decisionmaking, we are disinclined to give the Commission the "benefit of the doubt" which it argues it should have. *See* br. for respondent FCC at 52-53.

is going to pay how much to see feature films and nonspecific sports events on pay cable.[61]

The meaning of the various mathematical demonstrations is even less certain. Petitioner American Broadcasting Companies, Inc., for example, has proposed the following technique for estimating the relative income available to cable and conventional television:

> 30. The most comprehensive attempt to develop a methodology for making this comparison is contained in the reply comments of the American Broadcasting Company. It there developed a formula for estimating the pay cable dollars available for the purchase of any particular program. The formula, in somewhat simplified terms, is as follows:
>
> (Total households) x (percent of households with tv sets) x (percent of households with tv sets that are cable tv subscribers) x (percent of cable tv subscribers that have pay cable option available) x (percent of subscribers with pay option that are pay subscribers) x (percent of pay subscribers that view program in question) x (charge to subscriber for program) x (percent of subscription charge passed through to program supplier)=(total national pay cable dollars available for the purchase of program in question).

ABC's own assumptions as to the state of the pay cable television industry in 1980 are as follows:

[61] Specific sports events are defined in the *First Report and Order, supra* note 2, 52 FCC 2d at 59-60, JA 83-84, and in 47 C.F.R. §§ 76.225(b)(1)-(b)(2) (1975). The record reveals that evidence relating to the siphoning of nonspecific sports events is scanty but that available data indicate "that there has been no interference with established over-the-air broadcasting patterns." Comments of Professional Baseball in Docket 19554, at 28, JA 1069 (Sept. 20, 1974).

Total household		75,400,000
TV set penetration	percent	97
CATV penetration	do	35
CATV penetration with pay TV potential	do	80
Pay subscriber penetration of systems with pay potential	do	15
Percent of pay subscribers viewing program	do	50
Charge to subscriber for program	dollars	2.25
Percent of pay fee collected passed on to program producers	percent	35

In the circumstance posited by ABC, slightly more than 1.5 million homes would pay $2.25 each for a particular program making available slightly more tha[n] $1.2 million dollars to the pay cable industry for the purchase of the program in question. This, ABC suggests, compares with the $1.5 million dollars a network might pay for two showings of a "blockbuster" feature film like *Love Story* during a five-year period, and with the $1 million dollars that might be paid for a movie of somewhat less appeal.

First Report and Order, supra, 52 FCC 2d at 9-10, JA 33-34. From this demonstration American Broadcasting Companies and other petitioners who presented similar mathematical models would draw the conclusion that

> [p]ay cable operations will have more money than television stations or television networks to purchase programming and, being creatures of a competitive economic system, will inevitably purchase much of the best programming now broadcast on free television and leave free television only with what is left over. * * *

Id. at 10, JA 34.

Even conceding the accuracy of the figures used (a concession which finds no support in the record, however), we think the proponents of the mathematical models have not proved their case. The problem is the incommensurability of the ultimate figures compared: nationwide income of pay cablecasters in 1980 on the one

hand, and recent, but historical,[62] network expenditures on the other.[63] It seems patently obvious that no comparison is valid unless financial figures are extrapolated to the same year. More important is the potential for distortion introduced into the comparison by using *income* on one hand versus *expenditure* on the other. The Justice Department and other petitioners have repeatedly pointed out that the conventional television industry is highly concentrated and is, therefore, likely to enjoy substantial monopoly and monopsony power. *See, e.g.*, Comments of the United States Department of Justice in Docket No. 19554, at 20, JA 168 (April 7, 1969); Comments of the United States Department of Justice in Docket No. 19554, at 15-16, JA 194-195 (Sept. 5, 1969). Evidence consistent with such an inference is readily available. For example, Noll, Peck and McGowan report that television broadcast stations enjoyed a 20 percent return on sales in 1969 versus eight percent for all manufacturing industry[64] and suggest that this is evidence that "competition is less rigorous in television than elsewhere in the economy."[65] To be sure, television and manufacturing are very different industries, and had the Commission evaluated and rejected the arguments of the Justice Department and others a different question

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[62] The precise date of network expenditure data is not clear. American Broadcasting Companies' presentation to the Commission used 1972 data. *See* Further Comments of American Broadcasting Companies, Inc. in Docket No. 19554, at 14, JA 698 (Sept. 20, 1974). In general, data contemporaneous with the date of comment submission seem to have been used.

[63] The deficiencies noted here were pointed out to the Commission in Comments of Optical Systems Corp. in Docket No. 19554, at 22, JA 1002 (Sept. 20, 1974).

[64] R. NOLL, M. PECK & J. MCGOWAN, *supra* note 42, at 16. The National Association of Broadcasters has estimated that 1975 profit margins will average 18.9 percent. *See* Broadcasting, July 26, 1976, at 19.

[65] R. NOLL, M. PECK & J. MCGOWAN, *supra* note 42, at 17.

would be presented on this review. But the Commission did not consider whether conventional television broadcasters could pay more for feature film and sports material than at present without pushing their profits below a competitive return on investment and, consequently, it could not properly conclude that siphoning would occur because it could not know whether or how much broadcasters, faced with competition, would increase their expenditures by reducing alleged monopoly profits. Since the Commission did not assess either potential distorting effect of the comparison offered by the broadcasters, any conclusion it may have drawn from this evidence would be arbitrary.

We have similar difficulties with the second cardinal assumption of the Commission, *i.e.*, that "siphoning" would lead to loss of film and sports programming for audiences not served by cable systems or too poor to subscribe to pay cable. *See* Transcript of Oral Argument at 61-62; br. for respondent FCC at 53-54. To reach such a conclusion the Commission must assume that cable firms, once having purchased exhibition rights to a program, will not respond to market demand to sell the rights for viewing in those areas that cable firms do not reach. We find no discussion in the record supporting such an assumption. Indeed, a contrary assumption would be more consistent with economic theory since it would *prima facie* be to the advantage of cable operators to sell broadcast rights to conventional television stations in regions of the country where no cable service existed. Moreover, the greater the area not covered by cable, the greater the demand would tend to be for broadcast rights, and the more likely it would be that, through a combination of cable and broadcast, nationwide coverage would be achieved.

We find the Commission's argument that "siphoning" could lead to loss of programming for those too poor to purchase cable television more plausible. Here again,

however, we find that the Commission has not documented its case that the poor would be deprived of adequate television service and, worse, that the Commission, by prohibiting advertising in connection with subscription operations, has virtually ensured that the price of pay cable will never be within reach of the poor. There is little disagreement at the theoretical level about the mechanism through which the poor would be deprived of broadcast service in markets served by cable television. Cable operators, to be able to sell a show, would require exclusive exhibitions rights in the markets they served, with the result that events purchased by cable operators for subscription presentation would be unavailable to broadcasters, or would be available only after a delay. What follows from this scenario, even assuming that cable operators would have the financial strength to outbid broadcasters, is by no means clear. There is uncontradicted evidence in the record, for example, that the popularity of film material does not decline with an increase in the interval between first theater exhibition and first television broadcast. *See* Comments of Program Suppliers in Docket No. 19554, at 21, JA 386 (Nov. 1, 1972). At least as to movies, therefore, "siphoning" may not harm the poor very much.

Equally important, the pay cable rules taken as a whole scarcely demonstrate a consistent solicitude for the poor. Thus, although "free" home viewing relies upon advertiser-supported programming, the Commission has in this proceeding barred cable firms from offering advertising in connection with subscription operations. *See* note 55 *supra*. As a result, the Commission forecloses the possibility that some combination of user fees and advertising might make subscription cable television available to the poor, giving them access to the diverse programming cable may potentially bring. As has already been noted, *see* pages 46-48 *supra*, the advertising ban section of the regulations was developed to meet wholly different regulatory problems and it has been retained here,

not because of its intrinsic merit, but only because no one objected too much. We are thus left with the conclusion that, if the Commission is serious about helping the poor, its regulations are arbitrary; but if it is serious about its rules, it cannot really be relying on harm to the poor. Whatever may be the ultimate validity of this argument, its principal defect on this review is that there is no record evidence to support it.

(b) *Consideration of Anticompetitive Effects*

Many petitioners, while not conceding the need for regulation, press a series of additional objections to the rules which collectively represent a charge that the Commission has failed to consider anticompetitive effects of the regulatory strategy it has adopted. For analytic purposes the various theories of petitioners can be treated as two: first, a contention that the Commission has inadequately resolved traditional antitrust objections to the strengthening of broadcasters' monopsony power over the feature film and sports broadcasting industries; and, second, that the Commission has similarly been oblivious to the rules' negative impact on its otherwise long-standing policy favoring diversification of control of programming choices. We will treat these arguments seriatim.

Although much attention has been paid in brief to the question whether the Commission was obliged to consider traditional antitrust issues in formulating rules to be issued under its "public interest, convenience, or necessity" [66] standard, we do not think this precise issue is before us at this time. Throughout this proceeding the Commission has sought comments on the anticompetitive impact of its rules and has asked that less restrictive alternatives be presented to it. *Notice of Proposed Rulemaking and Memorandum Opinion and Order, supra*, 35

[66] 47 U.S.C. § 303(r) (1970).

FCC 2d at 898 (¶ 12(b)), JA 6. The Commission, in its *First Report and Order*, also treated the antitrust issue as one which required an answer and properly stated the issue raised:[67] "whether the public interest considerations which underlie the rules outweigh the public interest considerations in support of unfettered competition." 52 FCC 2d at 45, JA 69. Because the Commission has throughout these proceedings found the antitrust issue to be relevant to discharge of its public interest obligation,[68] the only issue properly before this court is whether the Commission met its obligation to

[67] We do not agree with the suggestion of some petitioners that the Commission must demonstrate that the means it has chosen have the least impact on competition consistent with achievement of the Commission's purposes. To the extent that First Amendment and antitrust considerations coincide, it *is* necessary to make such a showing. *See* pp. 76-77 *infra*. Otherwise, we think our recent decision in *United States v. CAB*, 167 U.S.App.D.C. 313, 318-320, 511 F.2d 1315, 1320-1322 (1975), is controlling and requires rejection of a least restrictive alternative approach. In that case the Justice Department, advocating a least restrictive alternative approach, challenged CAB action under § 102 of the Federal Aviation Act, 49 U.S.C. § 1302 (1970), which expressly incorporates anticompetitive effect as one of six factors to be considered in assessing the "public convenience and necessity." The Department's argument was rebuffed in favor of a balancing approach on the basis of a number of precedents. Anticompetitive factors are also only one of a number of factors to be considered under the Communications Act, *see, e.g., National Broadcasting Co. v. United States*, 319 U.S. 190, 222-224 (1943); *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 94 (1953); *United States v. Radio Corp. of America*, 358 U.S. 334 (1959). Because of the similarity in statutory schemes, we think *United States v. CAB, supra*, controls our standard of review here.

[68] There can be no question that the Commission can properly consider antitrust issues. *See, e.g., National Broadcasting Co. v. United States, supra* note 67, 319 U.S. at 222-224; *FCC v. RCA Communications, Inc., supra* note 67, 346

make a record "enabl[ing] us to see * * * why the agency reacted to [major issues of policy] as it did." *Automotive Parts & Accessories Ass'n v. Boyd, supra*, 132 U.S. App.D.C. at 208, 407 F.2d at 338; *see* pages 51-52 *supra*. The short answer is: It did not.

We cannot fathom how the Commission reached the conclusion that the balance here should be struck in favor of regulation. Paragraph 150 of the *First Report and Order*, which contains the only discussion purporting to be an explanation, is obviously flawed and is completely irrelevant to most of the antitrust issues raised.[69] The Commission analogizes the regulatory problem here to that presented in *United States v. Southwestern Cable Co., supra*. This is simply incorrect. The exclusivity and distant signal rules reviewed there did not implicate questions of anticompetitive impacts on filmmakers or sports entrepreneurs and presented no occasion for an attempt to quantify or qualify the competitive harm resulting from reinforcing broadcasters' monopsony power over those industries. Nor did these rules address situations of alleged selective siphoning; the harm to be avoided was fragmentation of audiences leading to the financial demise of UHF and educational broadcasting. Economic harm in this sense is not at issue here, as the Commission itself recognizes. *See Memorandum Opinion and Order, supra*, 54 FCC 2d 800-802, JA 120-122 (¶¶ 10, 11, 18). *See* also pages 36, 52-53 *supra*. Moreover, even a cursory glance at the Supreme Court's opinion in *Southwestern Cable Co.* would show that the Court did not,

U.S. at 94; *United States v. Radio Corp. of America, supra* note 67, 358 U.S. at 351; *General Telephone Co. of Southwest v. United States*, 449 F.2d 846 (5th Cir. 1971); *Nat'l Ass'n of Independent Television Producers & Distributors v. FCC*, 502 F.2d 249, 256 (2d Cir. 1974).

[69] The Commission's own excellent summary of the antitrust and diversity issues presented can be found in the *First Report and Order, supra* note 2, 52 FCC 2d at 37-39, JA 61-63.

contrary to the assertion of the Commission here, affirm the Commission's findings that anticompetitive effects could be tolerated because cable use of broadcast signals constituted "unfair competition" and consequently regulation was needed "to ameliorate the risk that the burgeoning CATV industry would have a future adverse impact on television broadcast service, both existing and potential * * *." 52 FCC 2d at 45, JA 69. Instead the Court permitted regulation because it would further the congressionally approved goals of "significantly wider use * * * of the available ultra-high-frequency channels," and of "encourage[ment of] * * * sound and adequate programs to utilize the television channels now reserved for educational purposes." 392 U.S. at 174-175, *quoting* H.R. Rep. No. 1635, 89th Cong., 2d Sess. 7 (1966). Therefore, *Southwestern Cable Co.* certainly does not establish the proposition that "unfair competition" requires the general protection of broadcast television.

Even had the *Southwestern Cable Co.* Court approved the Commission's "unfair competition" argument, application of that argument to cablecasting rather than retransmission of broadcast signals is unsupportable. What was considered unfair by the Commission in the distant signal cases was that cable was competing with local broadcasters by bringing into the local area *identical* programming plucked out of the air from distant stations. Because local broadcasters had to pay copyright royalties for this material and cable did not, cable was thought to have an unfair advantage.[70] Here, however, cablecasters and broadcasters alike must pay copyright royalties, and there is no evidence that the cablecasting function is in any way subsidized by cable's broadcast retransmission function. Even if there were such evidence, reliance on the "unfair competition" argument

[70] Under the recently amended Copyright Act cable operators will have to pay royalties for use of broadcast signals. *See* Pub. L. No. 94-553, § 111, 90 STAT. 2550-2558 (1976).

would still be misplaced since any exaction of an indirect charge from pay cable operators to redress the alleged competitive imbalance would raise the costs of cable services which must be paid by home viewers, an effect that would disadvantage the poor, thereby undercutting the Commission's stated authority for promulgating the pay cable rules. *See* pages 58-60 *supra*. Finally, we do not perceive any *public* benefit to be achieved by hobbling cable television to correct the sort of unfair competition alleged by the Commission.[71] The Supreme Court has found that cable's free use of broadcast signals does not affect the amount of compensation paid to copyright holders, *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394, 412-413 (1974), and there can be no doubt that the absence of a charge "serve[s] the cause of promoting broad public availability of literature, music, and the other arts," *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

We further agree with the Justice Department that the issue of the reasonableness of the balance struck between regulatory and competitive goals, where these diverge, is a matter to be tested on the basis of material in the rulemaking record, not on the basis of legal precedent. Because of this, we think it odd that the Department has not presented factual data to the Commission which would allow it to assess the likely effect of its rules on various fields of competition. The Department's

[71] For this reason any Commission solicitude for the broadcast networks would be misplaced. *See FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940); *Carroll Broadcasting Co. v. FCC*, 103 U.S.App.D.C. 346, 258 F.2d 440 (1958). Moreover, the network petitioners have shown no economic injury to them arising from cable's free use of broadcast signals, and we doubt that such a showing could be made. *See Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394, 412 (1974) (fee broadcasters can charge is increased by the number of viewers added through cable retransmission).

arguments are basically speculative:[72] they are premised on the unverified assumption that enhancement of competition—actual or potential—is always a good.[73] Certainly there are no "specific findings" proposed, although the Department would impose such a standard on the Commission.[74] Indeed, the only argument presented that rises above the speculative is one based on legal precedents, not fact—that a private agreement to accomplish the result dictated by the pay cable rules would

[72] In this respect the Department's arguments fall short of the standard of significance required to mandate a Commission rebuttal. *See* p. 50 & note 58 *supra*.

[73] Serious questions would be raised if the Commission sought to justify its rules solely on the basis of such a presumption. The Supreme Court in *FCC v. RCA Communications, Inc., supra* note 67, while recognizing that enhancement of competition was a relevant factor, reversed the Commission because it had not shown that "competition would serve some beneficial purpose." 346 U.S. at 94. Similarly, the Court has held that the Commission may not deny a license solely on the ground that a grant would facilitate or constitute an antitrust violation. *See United States v. Radio Corp. of America, supra* note 67. These cases would seem to stand for the proposition that the Commission may not assume that enhancement of competition is beneficial to the public interest unless it has examined the consequences of competition for the interests of listeners and viewers. *See also Citizens Committee to Save WEFM v. FCC*, 165 U.S. App.D.C. 185, 206, 506 F.2d 246, 267 (1974) (*en banc*).

[74] We do not adopt the suggestion of the Justice Department and other petitioners that the Commission must make specific findings concerning anticompetitive effects and regulatory benefits before it can properly assess the antitrust issue. Cases cited in support of this proposition all involved agency adjudication or formal rulemaking in which a record is created under the strictures of rules of evidence and the standard of review is substantial evidence. Findings and a record of the type mandated in such proceedings are not generally required in informal rulemaking, and we see no need to differentiate between antitrust issues and all other issues in reviewing agency action.

be a boycott and unlawful *per se*. Br. of respondent United States at 19. Thus while we appreciate and salute the participation of the Justice Department in these proceedings, in the future a greater contribution could be made if the Department, which is, after all, the repository of antitrust expertise in the federal government, would work with the Commission in developing the type of data necessary to an informed decision.

Petitioners' second argument—that the pay cable rules consolidate network control over program production and selection and are, therefore, inconsistent with other Commission policy and, perhaps, the First Amendment—had more force prior to repeal of the series restrictions in the *Second Report and Order*, *supra*. We agree with petitioners that the series rule would have restricted the market for independently produced entertainment programming, thereby creating an effect directly contrary to that sought to be achieved in the Prime Time Access Rules proceedings.[75] As a result the series rules could not have been sustained on the record before us. *See Greater Boston Television Corp. v. FCC*, *supra*, 143 U.S. App.D.C. at 394, 444 F.2d at 852; *New Castle County Airport Comm'n v. CAB*, *supra*, 125 U.S.App.D.C. at 270, 371 F.2d at 735. The related argument of some petitioners that the rules will have the effect of reducing the economic feasibility of cablecasting minority-interest programming, and hence of reducing diversity, is plausible, but we cannot say on this record that the

[75] *See Report and Order*, 23 FCC 2d 382, 384-395 (1970), *modified*, 25 FCC 2d 318 (1970), *further modified*, 44 FCC 2d 1081 (1974). Interestingly, the purpose of the Prime Time Access Rule was to help UHF television stations by increasing the supply of quality product. The series programming restriction, by working against this policy, therefore also worked against an outcome found vitally important by the Supreme Court in *United States v. Southwestern Cable Co.*, *supra* note 24, a case the Commission has nonetheless invoked in support of its rulemaking authority here.

postulated effect is more than speculative. Certainly an inquiry into this problem would be appropriate in any proceedings the Commission might have on remand. *Cf. Citizens Committee to Save WEFM v. FCC*, *supra*.

III. First Amendment

More stringent, but substantially similar rules to those adopted in the dockets under review here were upheld by this court in *NATO v. FCC*, *supra*, and it is wholly because of this precedent that the Commission believes the instant rules to be consistent with the First Amendment. *See First Report and Order*, *supra*, 52 FCC 2d at 44 (¶ 148), JA 68. Although we today reaffirm our holding in *NATO*, *see* Part V *infra*, we decline to extend *NATO* to Commission regulation of cable television since we find important differences between cable and broadcast television and "differences in the characteristics of new media justify diffferences in the First Amendment standards applied to them." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386 (1969).

Despite the novelty and complexity of the anti-siphoning rules challenged in *NATO*, the constitutional question decided there was straightforward: whether a grant of a broadcast license could be conditioned on terms which made reference to "the kind and content of programs being offered to the public." 136 U.S.App.D.C. at 365, 420 F.2d at 207. Phrased this way, the issue could be readily resolved on the basis of time-tested and well-known theories of the First Amendment. "With everybody on the air," wrote Justice Frankfurter over 30 years ago, "nobody could be heard. * * * [T]he radio spectrum simply is not large enough to accommodate everybody. There is a fixed natural limitation upon the number of stations that can operate without interfering with one another. Regulation of radio was therefore * * * vital to its development * * *." *National Broadcasting Co. v. United States*, 319 U.S. 190, 212-213 (1943)

(footnote omitted).[76] Although government division of the spectrum into discrete segments and subsequent allocation of those segments does not necessarily entail comparative licensing—for example, some have suggested that spectrum segments could be auctioned to the highest bidder,[77] thereby obviating the need for government control of the allocation process—the *National Broadcasting Co.* Court refused to restrict the Commission to the role of a "traffic officer, policing the wave lengths to prevent stations from interfering with each other." 319 U.S. at 215. Instead, the Court held it constitutionally permissible to allocate channels to " 'render the best practicable service to the community reached * * *,' " *id.* at 216, *quoting FCC v. Sanders Bros. Radio Station, supra*, 309 U.S. at 475, and, because of the scarcity of broadcast facilities, this necessarily allowed "comparative considerations as to the [kind and content of program] services to be rendered * * *," *id.* at 217; *see id.* at 226-227; *accord, Red Lion Broadcasting Co. v. FCC, supra*, 395 U.S. at 394; *Gross v. FCC*, 480 F.2d 1288, 1291-1292 (2d Cir. 1973); *Carter Mountain Transmission Corp. v. FCC, supra*, 116 U.S.App.D.C. at 98, 321 F.2d at 364. Review of Commission deliberations culminating in the rules affirmed in *NATO* reveals plainly that the sole purpose of the subscription broadcast television inquiry and the pilot subscription television operations was to determine how to allocate television licenses so that the overall service rendered a community was the "best practicable." [78] Therefore, there was no need for *NATO* to break new First Amendment ground, and a reading of the *NATO* opinion will show that it did not do so.[79]

The First Amendment theory espoused in *National Broadcasting Co.* and reaffirmed in *Red Lion Broadcasting Co.* cannot be directly applied to cable television since

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[76] *See also Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386-388 (1969); T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 660-667 (1970); Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67, 85-86 (1967). *But see* Kalven, *Broadcasting, Public Policy and the First Amendment*, 10 J. LAW & ECON. 15, 30-32 (1967).

[77] *See, e.g.*, Kalven, *supra* note 76, 10 J. LAW & ECON. at 30-32.

[78] *See generally Fourth Report and Order, supra* note 5.

[79] The *NATO* court did not itself rely on *National Broadcasting Co.*, although the opinion as a whole is intended to be a response to the rather narrow question of the Commission's authority to allocate television channels to subscription stations. Nonetheless, the First Amendment discussion in *NATO* does recognize the scarcity rationale and cite cases which in turn rely on *National Broadcasting Co. See* 136 U.S. App.D.C. at 365 & n.35, 420 F.2d at 407 & n.35. Ultimately, however, primary reliance was placed on tests developed in *Banzhaf v. FCC*, 132 U.S.App.D.C. 14, 33-35, 405 F.2d 1082, 1101-1103 (1968), *cert. denied*, 396 U.S. 842 (1969), a case which affirmed the Commission's authority to order presentation of material rebutting cigarette commercials. *See* 136 U.S. App.D.C. at 366, 420 F.2d at 408. The First Amendment holding in *Banzhaf*, which relied on the commercial speech doctrine, has been limited by the subsequent cases of *Bigelow v. Virginia*, 421 U.S. 809 (1975), and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), and would not in any case be directly applicable to suppression of film and sports programming. On the other hand, *Banzhaf's* requirements that ideas not be affected and that on balance diversity of expression be increased by regulation, applied by the *NATO* court, *see* 136 U.S.App.D.C. at 366, 420 F.2d at 408, come directly from *National Broadcasting Co., see* 319 U.S. at 226-227, and *Red Lion Broadcasting Co., see* 395 U.S. at 393. Thus, if *NATO* moves beyond *National Broadcasting Co.* at all, it is only to the extent that it imposes the additional requirement that regulation increase diversity. *NATO's* conclusion that the subscription broadcast television rules would increase diversity is not, however, transferable to the pay cable rules since any assessment of First Amendment gains and losses must be made on the basis of the record in front of us today and not on the basis of legal precedent.

an essential precondition of that theory—physical interference and scarcity requiring an umpiring role for government—is absent.[80] Interference among speakers on a

[80] The Commission in brief has argued that, regardless of the applicability of *NATO*, decisions affirming prior cable television rules, including some applicable to cable systems that did not use broadcast signals, provide precedent for upholding the pay cable rules against a First Amendment attack. We think the Commission's reliance is misplaced, as a review of the cited cases will show. In some cases the First Amendment issue was simply not mentioned and may not even have been raised on review. *See, e.g., United States v. Midwest Video Corp.*, 406 U.S. 649 (1972); *United States v. Southwestern Cable Co., supra* note 24. In others the rationale was the scarcity argument developed in *National Broadcasting Co.* The earliest of these cable cases, *Carter Mountain Transmission Corp. v. FCC*, 116 U.S.App.D.C. 93, 321 F.2d 359, *cert. denied*, 375 U.S. 951 (1963), did not in fact deal with regulation of cable television. It held simply that the Commission could deny a microwave license to a cable system operator for use in retransmitting broadcast signals in conjunction with cable television unless he agreed to use the licensed facility in a manner not endangering the economic health of broadcasters serving the same area. This principle is uncontroversial, *see FCC v. Sanders Bros. Radio Station, supra* note 71, 309 U.S. at 476, and was justified entirely on Justice Frankfurter's logic in *National Broadcasting Co. See* 116 U.S.App.D.C. at 98, 321 F.2d at 364. A similar fact situation was presented in *Idaho Microwave, Inc. v. FCC*, 122 U.S.App.D.C. 253, 352 F.2d 729 (1965). The subsequent case of *Buckeye Cablevision, Inc. v. FCC*, 128 U.S. App.D.C. 262, 387 F.2d 220 (1967), did involve application of Commission rules to a cable system that did not use microwave broadcast facilities. The issue presented was whether Commission rules prohibiting cable transmission of signals imported from distant broadcast stations (now codified at 47 C.F.R. §§ 76.51-76.161 (1975)) violated cable operators' First Amendment rights. In holding that the rules were constitutional the court, without discussion, cited *National Broadcasting Co.* and *Carter Mountain*, thus apparently incorrectly treating the case as one involving the scarcity and allocation rationale. *See* 128 U.S.App.D.C. at 267 n.23, 387 F.2d at 225 n.23. The Eighth

single cable is controlled by electrical equipment which divides the cable into channels and by the owners of the

Circuit, in passing on the same rules, cited *National Broadcasting Co.* and *Buckeye Cablevision* and similarly treated the issue as one indistinguishable from broadcasting:

> The Commission's [rules] regulating CATVs ha[ve] the same constitutional status under the First Amendment as regulation of the transmission of signals by the originating television stations. * * * The crucial consideration is that they do use radio signals * * *.
> * * *

Black Hills Video Corp. v. FCC, 399 F.2d 65, 69 (8th Cir. 1968). Other cases cited by the Commission rely on various combinations of *National Broadcasting Co., Carter Mountain, Buckeye Cablevision*, or *Black Hills Video*. In these circumstances, the cited cases provide no independent support for the constitutionality of the pay cable rules.

To the extent that *Black Hills Video* stands for the proposition that the Commission in some sense "owns" the broadcast spectrum and can condition use of broadcast signals accordingly, it must be rejected. The public owns parks, sidewalks, and other "public forums," and yet it is beyond argument that use of such property by the public cannot be conditioned on whether the government agrees with or desires to allow or disallow the ideas which a speaker seeks to convey. *See, e.g., Police Department v. Mosley*, 408 U.S. 92, 97-98 (1972); T. EMERSON, *supra note* 76, at 660. Moreover, on the record before us there is no evidence that cablecasting and signal retransmission are not completely separate and distinct activities, *cf. Teleprompter Corp. v. Columbia Broadcasting System, Inc., supra* note 71, 415 U.S. at 405 (no "nexus" between broadcast and retransmission functions); consequently any constitutionally permissible public control over broadcast signals is beside the point as justification for control of the cablecast function. Further, as we have already indicated, *see* note 44 *supra*, Commission power over recipients of broadcast signals would not extend to access cablecasters.

We express no opinion here on the question whether Commission control of microwave radio links used by cablecast networks would extend the Commission's constitutionally permitted authority over cable.

cable system who determine who shall have access to each channel and for how long. Nor is there any apparent physical scarcity of channels relative to the number of persons who may seek access to the cable system. Currently cable systems have the capacity to convey over 35 channels of programming. Technology is now available that would increase capacity to 80 channels, and in the future channel capacity may become unlimited. *See* br. for petitioner Home Box Office, Inc. at 9; Note, *Cable Television and Content Regulation: The FCC, the First Amendment and the Electronic Newspaper*, 51 N.Y.U. L. REV. 133, 135 (1976). And even though there is some evidence that local distribution of cable signals is a natural economic monopoly,[81] which may raise the spectre of private censorship by the system owner, there is no readily apparent barrier of physical or electrical interference to operation of a number of cable systems in a given locality. In any case, scarcity which is the result solely of economic conditions is apparently insufficient to justify even limited government intrusion into the First Amendment rights of the conventional press, *see Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 247-256 (1974), and there is nothing in the record before us to suggest a constitutional distinction between cable television and newspapers on this point.[82]

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[81] See CABINET COMM. ON CABLE COMMUNICATIONS, *supra* note 21, at 10; *First Report and Order*, 20 FCC 2d 201, 222 n.27 (1969) (Docket No. 18397):

> cable television's operations have developed on a non-competitive, monopolistic basis in the particular areas served with no instance, to our knowledge, where a member of the public subscribes to more than one cable television service.

[82] The Supreme Court in *Miami Herald* further found that the statute at issue would have had a chilling effect on presentation of controversial material about public figures. *See* 418 U.S. at 256-258. This suggests that the Court was concerned about an overall diminution of diversity. Whether rules seeking to reduce private control of scarce communications resources which did not have this effect would be valid thus appears to be an open question. A requirement that cable system operators dedicate certain channels to common carrier use might avoid such an infirmity and two courts, without reaching the First Amendment issue, have already indicated that the Commission could compel such sharing of cable channels. *See United States v. Midwest Video Corp.*, *supra* note 80; *American Civil Liberties Union v. FCC*, 523 F.2d 1344, 1351 (9th Cir. 1975). Thus, on a proper record, *Miami Herald* might present no impediment to some types of Commission regulations.

Alternatively, local government involvement in the franchise and regulation of cable television, *see* PROMISE VERSUS PERFORMANCE, *supra* note 30, at 20-23, might make cable owners "the state" for constitutional purposes, thus subjecting them to First Amendment scrutiny. *Cf. Public Utilities Comm'n v. Pollak*, 343 U.S. 451, 462 (1952); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303 (1974); T. EMERSON, *supra* note 76, at 663. Again, this question cannot be resolved on the record before us.

The absence in cable television of the physical restraints of the electromagnetic spectrum does not, however, automatically lead to the conclusion that no regulation of cable television is valid.[83] As Professor Meiklejohn has

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[83] The existence of an alternative First Amendment theory justifying cable regulation is denied by many petitioners. Their argument, in summary, is that movies (and apparently sports events) are a form of speech protected by the First Amendment. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952). Consequently the rules constitute a prior restraint on protected speech which, if not always impermissible, *Times Film Corp. v. City of Chicago*, 365 U.S. 43 (1961), is presumptively invalid, *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963), and is here rebutted by no substantial purpose that could not be equally well served by less restrictive rules or is, in any event, invalid because the rules do not afford the procedural safeguards required by *Freedman v. Maryland*, 380 U.S. 51 (1965). This argument is not unpersuasive, but on reflection we do not think it fits the facts of this case.

eloquently demonstrated, *see* A. MEIKLEJOHN, POLITICAL FREEDOM 24-48 (1960), rules restricting speech do not necessarily abridge freedom of speech. In particular, and regardless of the medium involved, regulations which transform cacophony into ordered presentation can often be consistent with the First Amendment since "the point of ultimate interest is not the words of the speakers, but the minds of the hearers," and the latter will not be affected unless each speaks in turn. *Id.* at 26; *see Red Lion Broadcasting Co. v. FCC*, *supra*, 395 U.S. at 387-388. Further, because "the right of free speech * * * does not embrace a right to snuff out the free speech of others," *id.* at 387; *Associated Press v. United States*, 326 U.S. 1, 20 (1945), government may adopt reasonable regulations separating speakers competing and interfering with each other for the same audience. *See Red Lion Broadcasting Co. v. FCC*, *supra*, 395 U.S. at 387-389. Restriction becomes abridgment only when government seeks to limit speech "because it is on one side of the issue rather than another," A. MEIKLEJOHN, *supra*, at 27; *see Madison Joint School Dist. No. 8 v. Wisconsin Empl. Relations Comm'n*, —— U.S. ——, ——, 45 U.S. L. WEEK 4043, 4045 (Dec. 8, 1976), or because it is thought unwise, unfair, false, or dangerous, *see, e.g., Police Department v. Mosley*, 408 U.S. 92, 95-96 (1972). *See generally* Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L. J. 1001, 1005-1010 (1976). Certainly this is the broader teaching of *National Broadcasting Co.*, *see* 319 U.S. at 215-218, 226-227, and it is a teaching relevant regardless of the source of conflict between speakers. *See Cox v. New Hampshire*, 312 U.S. 569, 576 (1941) (government may regulate conflicting parades); *Kovacs v. Cooper*, 336 U.S. 77, 86 (1949) (suggesting that government regulation of hecklers would be permissible).

Similarly, the First Amendment does not bar regulation of the "collateral consequences" [84] or "collateral aspects" [85] of speech. For example, use of public places for speech-related purposes, although a right jealously guarded by the First Amendment,[86] is subject to reasonable restraints intended to ameliorate traffic congestion,[87] reduce noise to tolerable levels,[88] or prevent "capture" of unwilling audiences.[89] To be sure, many cases dealing with the collateral consequences of speech admit of analysis in terms of "speech" versus "conduct" or "pure speech" versus "speech plus." But the principle for which these cases stand cannot be limited to situations in which the evil arises because of motion unrelated to movement of the mouth and vocal cords. As the Supreme Court appears to have recognized (especially in cases dealing with symbolic speech),[90] conduct and speech can often be separated only in the eyes of the beholder and therefore First Amendment doctrines turning on the true "es-

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[84] Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 23.

[85] Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 5 (1965).

[86] *See, e.g., Police Department v. Mosley*, *supra* note 80; *Grayned v. City of Rockford*, 408 U.S. 104 (1972). *See generally* Kalven, *supra* note 84.

[87] *See, e.g., Cox v. New Hampshire*, 312 U.S. 569 (1941).

[88] *See Grayned v. City of Rockford*, *supra* note 86, 408 U.S. at 114-121; *Kovacs v. Cooper*, 336 U.S. 77 (1949).

[89] *See, e.g., Lehman v. City of Shaker Heights*, *supra* note 82.

[90] *See, e.g., Spence v. Washington*, 418 U.S. 405 (1974); *Cohen v. California*, 403 U.S. 15 (1971); *United States v. O'Brien*, 391 U.S. 367 (1968). *See also Procunier v. Martinez*, 416 U.S. 396 (1974) (applying collateral consequences analysis to prisoner mail censorship).

sence" of an expressive event can provide no very certain guide to judicial decision.[91] Instead, the important inquiry here, as in Meiklejohn's conflicting speaker situation, turns on the purpose for which government regulates. Regulations intended to curtail expression—either directly by banning speech because of a harm thought to stem from its communicative or persuasive effect on its intended audience, *see Spence v. Washington*, 418 U.S. 405, 411-414 & n.8 (1974); *Cohen v. California*, 403 U.S. 15 (1971); *United States v. O'Brien*, 391 U.S. 367, 382 (1968); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1953), or indirectly by favoring certain classes of speakers over others, *see Madison Joint School Dist. No. 8 v. Wisconsin Empl. Relations Comm'n*, *supra*, —— U.S. at ——, 45 U.S. L. WEEK at 4045; *Buckley v. Valeo*, 424 U.S. 1, 17 (1976); *Police Department v. Mosely*, *supra*, 408 U.S. at 97-98; *Grayned v. City of Rockford*, 408 U.S. 104 (1972)—can be justified (if at all) only under categorization doctrines such as obscenity, "fighting words," or "clear and present danger." *See* Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1496-1508 (1975). Regulations evincing a "governmental interest * * * unrelated to the suppression of free expression * * *," *United States v. O'Brien*, *supra*, 391 U.S. at 377, are treated differently, however. If such regulations "[1] further an important or substantial governmental interest; * * * and [2] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance

[91] *See* Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1493-1496 (1975). *Compare, e.g., Buckley v. Valeo*, 424 U.S. 1, 16 (1976), *with Buckley v. Valeo*, 171 U.S.App.D.C. 172, 191-195, 519 F.2d 821, 840-844 (1975), *and* Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L. J. 1001 (1976).

of that interest," *id.* (bracketed numbers added), then the regulations are valid."[92]

Applying *O'Brien* here, we cannot say that the pay cable rules were intended to suppress free expression. The narrow purpose espoused by the Commission—protecting the viewing rights of those not served by cable or too poor to pay for cable—is neutral. Indeed, it is not unlike a regulation quieting hecklers or enforcing order on the radio spectrum. As in those situations, the conduct regulated would otherwise blot out transmission of a message, regardless of its content, to at least a segment of its potential audience. Also like those cases, both those whose conduct is restrained by the regulation and those who benefit by it have First Amendment rights, although here the right is one to receive,[93] rather than transmit, information. True, unlike the heckler the person able to pay for cable television does not interrupt transmission of a message to all who might hear it; specifically, he does not affect his own First Amendment rights or those of others served by cable. That only one segment of an audience benefits from the pay cable rules does not, however, at least in this case, require a different result for, as we shall now show, execution of the Commission's purpose in favoring one group

[92] Although O'Brien was a case involving draft card burning, it has not been limited to that sort of symbolic speech situation. *See, e.g., Procunier v. Martinez*, *supra* note 90 (prisoners' mail); *A Quaker Action Group v. Morton*, 170 U.S.App.D.C. 124, 516 F.2d 717 (1975) (public gatherings at the White House). *See also Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 78-82 (1976) (Powell, J., concurring) (obscenity zoning).

[93] *See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, *supra* note 79, 425 U.S. at 756-757; *Procunier v. Martinez*, *supra* note 90, 416 U.S. at 408-409; *Kleindienst v. Mandel*, 408 U.S. 753, 762-763 (1972); *Red Lion Broadcasting Co. v. FCC*, *supra* note 76, 395 U.S. at 390.

would not necessarily deny material to the other or affect the range of ideas that are presented to either group.[94]

The Commission seeks only to channel movie and sports material to its intended recipients over broadcast television, rather than pay cable, whenever the economics of advertiser-supported programming permit. If the rules and their associated waiver provisions[95] achieved no more than this—a proposition which will be examined in detail below—they would present no barrier: material suitable for broadcast would be broadcast; material financially viable only on cable would be on cable. Those served by pay cable would surely be served by broadcast television as well and, therefore, would have access to anything that could profitably be presented on either medium. Those without cable would at least be no worse off than at present. Conversely, the speech of movie and sports

[94] Consequently, the pay cable rules, while equalizing access to the media for rich and poor, are not intended to have the effect proscribed in *Buckley v. Valeo*. *See* 424 U.S. at 17. For this reason we need not consider how to reconcile the Court's position in *Buckley* with the following flatly contradictory language in *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 415 U.S. 394, 123 (1974):

> The * * * public interest in providing access to the marketplace of "ideas and experiences" would scarcely be served by a system * * * heavily weighted in favor of the financially affluent, or those with access to wealth. * * *

See also NATO v. FCC, *supra* note 5, 136 U.S.App.D.C. at 365, 420 F.2d at 207.

[95] The provision relating to movies is set out at note 46 *supra*. The waiver provisions for sports programming are less clear. The Commission makes no mention of any waiver policy with respect to specific sports events. On the other hand, cablecasters may seek a waiver of the non-specific sports rules if they can demonstrate that a reduction in broadcast presentation of such events has been caused by "reasons completely unrelated to program siphoning." *First Report and Order*, *supra* note 2, 52 FCC 2d at 62, JA 86.

producers would not be affected because the regulations would not stand as a barrier to presentation of any material to one or both audiences.[96]

The speech of cablecasters, while undoubtedly inhibited, is similarly free from restrictions abridging freedom of expression. The rules clearly have no effect on traditional broadcast modes of persuasive speech such as news broadcasts or editorials. Nor do they affect films which the cablecaster has himself produced. Moreover, they do not even affect the cablecaster's ability to exhibit the work of others so long as no per-channel or per-program fee is charged. The sole effect of the rules is to prohibit the cablecaster from exhibiting for a separate fee the artistic work of others. Finally, no claim is made here that this narrow exclusion prevents the cablecaster from making an effective presentation of his views, nor for that matter is any claim made that cablecaster "endorsement" of the views of a particular film adds importantly to the message of the filmmaker.[97]

[96] A number of petitioners take the position that the rules reduce the overall profitability of feature films by restricting their commercial exploitation on both cable and broadcast television, with the result that fewer films are produced than would be the case in the absence of the rules. We do not think the record demonstrates such a causal connection between the rules and the overall health of the movie industry. But even if the rules did reduce the number of films produced, that effect would not rise to the level of a First Amendment violation. Such a result would prove too much. It would require invalidation of any general law which affected the profitability of the movie industry; this, however, is clearly not the law. *See, e.g., Associated Press v. United States*, 326 U.S. 1 (1945).

[97] That cablecasters might lose some profits by adopting these alternative modes of speaking is doubtless true. But in the absence of a showing of economic harm bordering on censorship, a diminution of profits does not itself present a First Amendment problem. *See* note 96 *supra*. *See also* the

Despite our conclusion that content regulations are not at issue here, we nonetheless hold that the rules as promulgated and as put into effect by the Commission cannot be squared with *O'Brien*'s other requirements and, consequently, they violate the First Amendment. The no-advertising[98] and 90-percent[99] rules clearly violate *O'Brien's* first criterion. Not only do they serve no "important or substantial * * * interest," 391 U.S. at 377, they serve no purpose which will withstand scrutiny on this record.[100] The sports and features films rules fare no better. We have already concluded that the Commission has not put itself in a position to know whether the alleged siphoning phenomenon is a real or merely a faciful threat to those not served by cable.[101] Instead, the Commission has indulged in speculation and innuendo. *O'Brien* requires that "an important or substantial gov-

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statement of the Supreme Court in rejecting the claim that motion picture "clearances" constituted violations of some theater owners' First Amendment rights:

> The main contest is over the cream of the exhibition business—that of the first-run theatres. * * * [This] shows * * * that the question here is not *what* the public will see or *if* the public will be permitted to see certain features. It is clear that under the existing system the public will be denied access to none. * * * The central problem presented by these cases is which exhibitors get the highly profitable first-run business. That problem has important aspects under the Sherman Act. *But it bears only remotely, if at all, on any question of freedom of the press, save only as timeliness of release may be a factor of importance in specific situations.*

United States v. Paramount Pictures, Inc., 334 U.S. 131, 166-167 (1948) (last emphasis added).

[98] *See* note 55 *supra.*

[99] *See* note 56 *supra.*

[100] *See* pp. 46-47 *supra.*

[101] *See* pp. 52-60 *supra.*

ernmental interest" be demonstrated, however—a requirement which translates in the rulemaking context into a record that convincingly shows a problem to exist and that relates the proffered solution to the statutory mandate of the agency. The record before us fails on both scores. Moreover, we doubt that the Commission's interest in preventing delay of motion picture broadcasts could be shown to be important or substantial on any record.[102]

Finally, we think the strategy the Commission has pursued in implementing its interest in preventing siphoning creates a restriction "greater than is essential to the furtherance of that interest." *Id.* The Commission's approach to preserving the present quantity and quality levels of broadcast television has not been to set such levels directly. Instead, the Commission has sought to divide film and sports material into that suitable for broadcasting and that which can be shown, if at all, only on cable, and has left broadcasters free to choose from among the former without any competition from cable television. Even assuming that such a scheme is reasonable, a position contested by a number of petitioners, it is nonetheless very clear that, if such a strategy is to be used, the rules must be closely tailored to the end to be achieved so that material not broadcast (because it is unsuitable or unsalable) is readily available to cablecasters. Otherwise the rules will curtail the flow of programming to those served by cable and willing to pay for it, with a consequent loss of diversity and unnecessary restriction of the First Amendment rights of producers, cablecasters, and viewers.

In assessing whether the rules are sufficiently discriminating in dividing available material into that which

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[102] The only evidence in the record before us relating to the effect of delay on the public interest is uncontradicted evidence showing that delay has *no effect* on the popularity of feature film material. *See* Comments of Program Suppliers in Docket No. 19554, at 21, JA 386 (Nov. 1, 1972).

may be cablecast and that which may not, the rules must be assessed without reference to the waiver provisions for two reasons. First, the Commission is on record that it will not freely grant waivers. *See In re Home Box Office, Inc., supra*, 51 FCC 2d at 322, JA 146. Second, the waiver procedures are fundamentally at odds with the procedures outlined in *Freedman v. Maryland*, 380 U.S. 51 (1965). We do not today hold that all the requirements of *Freedman* must be met, but certainly its central concern—that judicial proceedings be available for rapid removal of unwarranted prior restraints, 380 U.S. at 58-59—is applicable here.[103] *See Blount v. Rizzi*, 400 U.S. 410 (1971); *Illinois Citizens Committee for Broadcasting v. FCC*, 169 U.S.App.D.C. 166, 172, 515 F.2d 397, 403 (1975); *id.* at 183 & nn.27, 29, 515 F.2d at 414 nn.27, 29 (Bazelon, C.J., statement supporting rehearing *en banc*). *See generally* Monaghan, *First Amendment "Due Process"*, 83 HARV. L. REV. 518 (1970). Manifestly, the waiver provisions are not reasonably calculated to provide a speedy determination by the Commission or the courts of whether a film may be shown on cable. In the only case we know of, *In re Home Box Office, Inc., supra*, it took the Commission alone six and a half months to process a waiver petition, and judicial review has taken an additional 19 months. It further appears that the minimum time in which a waiver could be decided by the Commission is 10 days since this is the length of time allowed for parties to file papers in opposition to waiver petitions. *See* 47 C.F.R. § 1.45(a) (1975). These time periods equal or exceed those which the Supreme Court has found unacceptable in other cases. *See, e.g., Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175 (1968) (10

[103] This seems especially the case since the Commission tells us that delay is detrimental to the public interest. We are unaware of any evidence to support this proposition, however. *See* note 102 *supra*.

days); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (five-month delay after preliminary hearing).

Turning finally to the rules themselves, we agree with numerous petitioners that the rules are grossly overbroad. Examples of this are legion. It is undisputed, for example, that many films will never be suitable for broadcast television because of their limited appeal, their sophisticated subject matter, or their repeated releases to theaters. Yet, after a film is three years old its exhibition on cable television is restricted regardless of whether it was ever suitable for broadcast. Similarly, in some circumstances the sports rules have the anomalous effect of reducing the number of non-specific games that can be shown on cable television at the same time that broadcasters are reducing the number of games they will show. This provision is apparently justified on the ground that it is too difficult to monitor the reasons broadcasters cut back their game schedules and that at least some cutbacks might be caused by cable competition.[104] However, this record reveals no reason to think that cutbacks represent siphoning any more than they represent editorial or commercial judgment. Where the First Amendment is concerned, creation of such a rebuttable presumption of siphoning without clear record support is simply impermissible. *Cf. Freedman v. Maryland, supra*, 380 U.S. at 58. Other examples could be cited, but this would only belabor points already extensively presented to the Commission. To provide guidance to the Commission for any proceedings it may have on remand, however, we conclude by reminding the Commission that prior restraints on speech are heavily disfavored and can be sustained only where the proponent of the restraint can convincingly demonstrate a need.

[104] *See First Report and Order, supra* note 2, 52 FCC 2d at 62, JA 86.

IV. Ex Parte Contacts

During the pendency of this proceeding Mr. Henry Geller, a participant before the Commission and an *amicus* here, filed with the Commission a "Petition for Revision of Procedures or for Issuance of Notice of Inquiry or Proposed Rule Making." [105] Brief *amicus curiae* of Henry Geller at 1 (hereinafter Geller br.). In this petition *amicus* Geller sought to call the Commission's attention to what were alleged to be violations in these proceedings of the *ex parte* communications doctrine set out by this court in *Sangamon Valley Television Corp. v. United States*, 106 U.S.App.D.C. 30, 269 F.2d 221 (1959). The Commission took no action in response to the petition, and *amicus* now presses us to set aside the orders under review here because of procedural infirmity in their promulgation.

It is apparently uncontested that a number of participants before the Commission sought out individual commissioners or Commission employees for the purpose of discussing *ex parte* and in confidence the merits of the rules under review here. In fact, the Commission itself solicited such communications in its notices of proposed rulemaking [106] and, without discussing the nature, substance, or importance of what was said, argues before us that we should simply ignore these communications because *amicus'* petition was untimely, because

[105] *Amicus* urged the Commission to set out the essence of any oral *ex parte* communications and place written presentations in the public file. In addition *amicus* urged that interested parties be allowed an opportunity to comment on the material disclosed on an expedited basis, *i.e.*, within a three-week period.

[106] *See Notice of Proposed Rule Making and Memorandum Opinion and Order, supra* note 5, 35 FCC 2d at 899, J.A. 7; *Further Notice of Proposed Rule Making and Order for Oral Argument*, 48 FCC 2d 453, 463 (1974), JA 19.

amicus is estopped from complaining about a course of conduct in which he also participated, or, alternatively, because *Sangamon* does not apply.[107] In an attempt to clarify the facts this court *sua sponte* ordered the Commission to provide "a list of all of the *ex parte* presentations together with the details of each, made to it, or to any of its members or representatives, during the rule-making proceedings." In response to this order the Commission filed a document over 60 pages long which revealed, albeit imprecisely,[108] widespread *ex parte* communications involving virtually every party before this court, including *amicus* Geller.[109]

[107] The Commission has devoted only one footnote to this issue in its brief. Br. for respondent FCC at 50 n.55. This footnote does not challenge the accuracy of *amicus* Geller's statements and, indeed, offers us no facts at all that would tend to rebut the clear import of *amicus'* statements that *ex parte* contacts shaped the ultimate form of the pay cable rules. *See* text accompanying notes 110 to 116 *infra*.

The reasons urged by the Commission against reaching the *ex parte* contact issue are frivolous. There can be no waiver or estoppel raised here against our consideration of an issue vital to the public as a whole. Therefore, Mr. Geller's "dirty hands," if such they be, present no bar. Second, Mr. Geller sought a delay of only three weeks in which the public could comment on the information he urged be disclosed. Since he brought this matter to the attention of the Commission three *months* before issuance of the Commission's *First Report and Order*, and at a time when the Commission was still entertaining private communications, we find it incredible that the Commission would even suggest "the difficulty, if not the impossibility, of complying with this 'after the fact' request." Br. for respondent FCC at 50 n.55. Finally, we hold that *Sangamon*, properly construed, does apply to this proceeding. *See* text at note 124 *infra*.

[108] Because many Commission officials kept no accurate records on contacts, the list is incomplete and the dates of various contacts often uncertain or estimated.

[109] *Ex Parte* communications were also originated by many persons not party here, including members of Congress, mem-

Unfortunately, the document filed with this court does not allow an assessment of what was said to the Commission by the various persons who engaged in *ex parte* contacts. To give a flavor of the effect of these contacts, however, we think it useful to quote at length from the brief of *amicus* Geller:

> [*Ex parte*] presentations have in fact been made at crucial stages of the proceeding. Thus, in early 1974, then-Chairman Burch sought to complete action in this proceeding.[110] Because the Commission was "leaning" in its deliberations towards relaxing the existing rules "with 'wildcard' rights for 'blockbuster' movies,"[111] American Broadcasting Company's representatives contacted "key members of Congress," who in turn successfully pressured the Commission not to take such action.[112] Further, in

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bers of the trade press, and representatives of various performing arts groups.

[110] *See* Television Digest, March 4, 1974, at 1-2; Broadcasting, March 4, 1974, at 6; Television Digest, Feb. 18, 1974, at 1-2; Broadcasting, March 11, 1974, at 5.

[111] Television Digest, March 4, 1974, at 2.

[112] *Id.* (Senators' "action * * * was prompted by Hill visit by ABC Chairman Leonard Goldenson and President Elton Rule, whose only goal was to put halter on relaxation of pay-cable rules"); Broadcasting, March 4, 1974, at 6; *see* remarks by Everett H. Erlich, Senior Vice President and General Counsel, ABC, before the ABC Television Network Affiliates, Los Angeles, May 10, 1974, at 1:

> As most of you know, the FCC just prior to Chairman Burch's sudden departure was on the verge of modifying Pay-TV rules applicable to movies by loosening the 2 and 10-year limitations. They were also considering a so-called "wild card" exception for 12 to 18 pictures a year which would have exempted entirely the most popular features from the application of any rule. We took the leadership in opposing these proposals with the result that key members of Congress made it known in no un-

> the final crucial decisional period, the tentative course to be taken by the Commission would leak after each non-public meeting, and industry representatives would rush to make *ex parte* presentations to the Commissioners and staff. On March 10, 1975, the trade journals state that "word of last week's changes . . . got out during the week, and both broadcast and cable lobbyists rushed to the Commission, unhappy with some facets"[113]—that broadcast representatives ". . . were calling on commissioners on Friday . . ." to oppose the changes.[114] The following week, the trade press again reported that "various [industry] groups lobbied the Commission, pressing for changes in the tentative decision"[115]—that National Association of Broadcasters ". . . staff members met with [FCC] Broadcast Bureau staffers to present data backing up [an] asserted need for [a more restrictive] standard."[116]

Geller br. at 3-4 (footnotes edited and renumbered). It is important to note that many contacts occurred in the crucial period between the close of oral argument on October 25, 1974 and the adoption of the *First Report and Order* on March 20, 1975, when the rulemaking record should have been closed while the Commission was deciding what rules to promulgate. The information submitted to this court by the Commission indicates that during this period broadcast interests met some 18 times

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> certain terms that they did not expect the Commission to act on such a far-reaching policy matter without guidance. The Commission got the message and has postponed for several months reconsideration of this particular issue * * *.

[113] Television Digest, March 10, 1975, at 2; *see* Broadcasting, March 10, 1975, at 6.

[114] *See id.*

[115] Television Digest, March 17, 1975, at 3.

[116] Broadcasting, March 17, 1975, at 10.

with Commission personnel, cable interests some nine times, motion picture and sports interests five times each, and "public interest" intervenors not at all.

Although it is impossible to draw any firm conclusions about the effect of *ex parte* presentations upon the ultimate shape of the pay cable rules, the evidence is certainly consistent with often-voiced claims of undue industry influence over Commission proceedings, and we are particularly concerned that the final shaping of the rules we are reviewing here may have been by compromise among the contending industry forces, rather than by exercise of the independent discretion in the public interest the Communications Act vests in individual commissioners. *Cf. National Ass'n of Independent Television Producers & Distributors v. FCC*, 502 F.2d 249, 257-258 (2d Cir. 1974). Our concern is heightened by the submission of the Commission's Broadcast Bureau to this court which states that in December 1974 broadcast representatives "described the kind of pay cable regulation that, in their view, broadcasters 'could live with.'" [117]

[117] A similar note was struck by Chairman Wiley in a speech to the Federal Communications Bar Association:

> There is one other lobbying technique which disturbs me although I would acknowledge that it is largely due to a somewhat unfortunate practice on the part of the FCC. I mention it today because I want to put you on notice of my intention to change this practice wherever possible. When the Commission holds an oral argument on some rulemaking matter, we carefully divvy up the advocacy time available among various parties. When the argument is completed, the Commissioners should then be in the best position possible to make a tentative decision on the merits. Typically, however, such a decision is not made until long after the conclusion of the formal argument. During the delay until decision, oral argument often continues informally in the privacy of individual Commissioner and staff offices. I simply do not think that this is a good practice and, accordingly, and to the extent practicable, I hope to have the Commission making tentative judgments very quickly following oral argument, thus obviating the possibility of any further seriatim presentations.
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> * * * Compromises, fall-back positions, and the so-called "real facts" are often reserved for supplemental filings and, perhaps, subsequent visits to Commission offices.

FCC Mimeo. 21343 at 4 (April 30, 1970).

If actual positions were not revealed in public comments, as this statement would suggest, and, further, if the Commission relied on these apparently more candid private discussions in framing the final pay cable rules, then the elaborate public discussion in these dockets has been reduced to a sham.

Even the possibility that there is here one administrative record for the public and this court and another for the Commission and those "in the know" is intolerable. Whatever the law may have been in the past,[118] there

[118] The legislative history of the Administrative Procedure Act has been read to imply that there is no such thing as an administrative record in informal rulemaking. *See, e.g.*, U.S. DEPT. OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 31 (1947) ("section 4(b) does not require the formulation of rules upon the exclusive basis of any 'record' made in informal rulemaking proceedings"). Professor Nathanson has similarly concluded:

> Section 553's notice-and-comment provisions were [originally] conceived of as instruments for the education of the administrator, especially on questions of policy; there is not the slightest indication that the purpose of the notice-and-comment proceeding was to develop a record by which a reviewing court could test the validity of the rule which the Administrator finally adopted.
>
> Apparently, an underlying assumption of the APA draftsmen was that any factual issues which became pertinent in a challenge to the validity of a section 553 rule would be resolved in the first instance in judicial proceedings—either in enforcement proceedings or in suits to enjoin enforcement. * * *

[continued]

can now be no doubt that implicit in the decision to treat the promulgation of rules as a "final" event in an ongoing process of administration is an assumption that an act of reasoned judgment has occurred, an assumption which further contemplates the existence of a body of material—documents, comments, transcripts, and statements in various forms declaring agency expertise or policy [119] —with reference to which such judgment was exercised. Against this material, "the full administrative record that was before [an agency official] at the time he made his decision," *Citizens to Preserve Overton Park, Inc. v. Volpe, supra*, 401 U.S. at 420, it is the obligation of this court to test the actions of the Commission for arbitrariness or inconsistency with delegated authority. *See id.* at 415-416; pages 48-52 *supra*. Yet here agency secrecy stands between us and fulfillment of our obligation. As a practical matter, *Overton Park's* mandate means that the public record must reflect what representations were made to an agency so that relevant information support-

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Nathanson, *Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review Under the Administrative Procedure Act and Other Federal Statutes*, 75 COLUM. L. REV. 721, 754-755 (1975). The Department of Justice, in apparent accord with these views, relied on the Commission's own rules, which defined the administrative record to be comments and reply comments, and not the Administrative Procedure Act, in arguing that the *ex parte* contacts in *Sangamon* were invalid. *See* br. of the United States on remand from the Supreme Court at 5-10, *Sangamon Valley Television Corp. v. United States*, 106 U.S.App.D.C. 30, 269 F.2d 221 (1959). *See also* Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185, 202-205 (1974).

[119] The precise content of this record is still a matter of some dispute. *Compare* Recommendation 74-4 of the Administrative Conference of the United States, *printed in* 3 RECOMMENDATIONS AND REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 48-52 (1974), *with* Pederson, *Formal Records and Informal Rulemaking*, 85 YALE L. J. 38, 64-65 (1975).

ing or refuting those representations may be brought to the attention of the reviewing courts by persons participating in agency proceedings. This course is obviously foreclosed if communications are made to the agency in secret and the agency itself does not disclose the information presented. Moreover, where, as here, an agency justifies its actions by reference only to information in the public file while failing to disclose the substance of other relevant information that has been presented to it, a reviewing court cannot presume that the agency has acted properly, *Citizens to Preserve Overton Park, Inc. v. Volpe, supra*, 401 U.S. at 415, 419-420; *see* K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 11.00 at 317 (1976), but must treat the agency's justifications as a fictional account of the actual decisionmaking process and must perforce find its actions arbitrary. *See Ruppert v. Washington*, 366 F.Supp. 686, 690 (D. D.C. 1973), *aff'd by order*, D.C. Cir. No. 73-1985 (Oct. 26, 1976).

The failure of the public record in this proceeding to disclose all the information made available to the Commission is not the only inadequacy we find here. Even if the Commission had disclosed to this court the substance of what was said to it *ex parte*, it would still be difficult to judge the truth of what the Commission asserted it knew about the television industry because we would not have the benefit of an adversarial discussion among the parties. The importance of such discussion to the proper functioning of the agency decisionmaking and judicial review processes is evident in our cases.[120] We have insisted, for example, that information in agency files or consultants' reports which the agency has identified as relevant to the proceeding be disclosed to the parties for adversarial comment. Similarly, we have required agencies to set out their thinking in notices of

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[120] *See* pp. 48-52 *supra*.

proposed rulemaking. This requirement not only allows adversarial critique of the agency but is perhaps one of the few ways that the public may be apprised of what the agency thinks it knows in its capacity as a repository of expert opinion.[121] From a functional standpoint, we see no difference between assertions of fact and expert opinion tendered by the public, as here, and that generated internally in an agency: each may be biased, inaccurate, or incomplete—failings which adversarily comment may illuminate. Indeed, the potential for bias in private presentations in rulemakings which resolve "conflicting private claims to a valuable privilege," *Sangamon Valley Television Corp. v. United States, supra*, 106 U.S. App.D.C., at 33, 269 F.2d at 224, seems to us greater than in cases where we have reversed agencies for failure to disclose internal studies. We do not understand the rulemaking procedures adopted by the Commission to be inconsistent with these views since those procedures provide for a dialogue among interested parties through provisions for comment, reply-comment, and subsequent oral argument.[122] What we do find baffling is why the Com-

[121] For an example of agency disclosure of expertise in a notice of proposed rulemaking, *see Environmental Defense Fund, Inc. v. EPA*, —— U.S.App.D.C .——, ——, —— F.2d ——, ——, slip op. at 13-14 (No. 75-2259, decided Nov. 10, 1976).

[122] The Commission's rules provide in relevant part:

§ 1.415 Comments and replies.

(a) After notice of proposed rule making is issued, the Commission will afford interested persons an opportunity to participate in the rule making proceeding through submission of written data, views, or arguments, with or without opportunity to present the same orally in any manner.

(b) A reasonable time will be provided for submission of comments in support of or in opposition to proposed

rules, and the time provided will be specified in the notice of proposed rule making.

(c) A reasonable time will be provided for filing comments in reply to the original comments, and the time provided will be specified in the notice of proposed rule making.

(d) No additional comments may be filed unless specifically requested or authorized by the Commission.

(e) For time limits for filing motions for extension of time for filing comments or reply comments, see § 146(b).

47 C.F.R. § 1.415 (1975). Substantially similar rules were construed in *Sangamon Valley Television Corp. v. United States, supra* note 118, 106 U.S. App.D.C. at 33-34, 269 F.2d at 224-225, to prohibit *ex parte* communications since such communications, as a practical matter, constituted additional comments for which no specific authority had been granted. *See* 47 C.F.R § 1.415(d) (1975). At the time of *Sangamon*, however, the Commission's rules and practice required "a showing of good cause," 106 U.S.App.D.C. at 34, 269 F.2d at 225, for approval of a request to submit additional comments. In the absence of this language, and given the apparent long-standing Commission interpretation of its own rules to allow *ex parte* contacts, *see* Geller br. at 7, the inference that the Commission has violated its own rules is less easy to draw from the rather obvious inconsistency between the published rules' strict timetable for comment and the actual practice of allowing comment at any time. Nonetheless, the Commission's practice of announcing a relaxation in its comment and reply-comment rules through the cryptic phrase, "[i]n reaching a decision in this matter, the Commission may take into account any other relevant information before it," 35 FCC 2d at 899, JA 7, is certainly inconsistent with the spirit of the policy disclosure requirements of the Freedom of Information Act, 5 U.S.C. § 552(a)(2)(B) (1970), which seek to give the public an understanding of how an agency actually works. One not familiar with Commission practices would be hard put to understand that the foregoing phrase effectively repealed 47 C.F.R. § 1.415(d), a fact corroborated by the complete absence of reported *ex parte* contacts from public interest intervenors other than *amicus* Geller, himself a former General Counsel of the Commission. In these circumstances, we do not think the Commission can be said to have specifically authorized addi-

mission, which apparently recognizes that ready availability of private contacts saps the efficacy of the public proceedings,[123] nonetheless continues the practice of allowing public and private comments to exist side by side.

Equally important is the inconsistency of secrecy with fundamental notions of fairness implicit in due process and with the ideal of reasoned decisionmaking on the merits which undergirds all of our administrative law. This inconsistency was recognized in *Sangamon*, and we would have thought that the principles announced there so clearly governed the instant proceeding that there could be no question of the impropriety of *ex parte* contacts

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tional comments as required by 47 C.F.R. § 1.415(d), *cf.* 5 U.S.C. § 552(a)(2) (prohibiting agency reliance on undisclosed policy statements), and we therefore hold that the Commission violated its own rules.

[123] I[t] seems to me that [a procedure prohibiting *ex parte* contacts] will also have a salutary effect on the level of advocacy during arguments before the Commission. I have often felt that we don't learn as much during oral proceedings as we would [*sic*]. Many oral presentations are not only repetitious * * * but also, if I may say so, fairly "hard-line". Compromises, fall-back positions, and the so-called "real facts" are often reserved for supplemental filings and, perhaps, subsequent visits to Commission offices.

Under my proposed procedures, if you decide to hard-line it, you had better be convincing—otherwise, you might just find that we decided to adopt your opponent's equally hard-line position. Hopefully, however, you can better utilize the opportunity of oral argument to avoid needless repetition, to perhaps zero in on a particularly important aspect of the case and, finally, to provide the Commission with some alternative solutions assuming, just assuming, that your proposed recommendation is not fully adopted.

Remarks of Richard E. Wiley, Chairman, FCC, FCC Mimeo. 21343 (April 30, 1974).

here. Certainly any ambiguity in how *Sangamon* should be interpreted has been removed by recent congressional and presidential actions.[124] In the Government in the Sunshine Act, for example, Congress has declared it to be "the policy of the United States that the public is entitled to the fullest practicable information regarding the decisionmaking processes of the Federal Government," Pub. L. No. 94-409, § 2, 90 STAT. 1241 (Sept. 13, 1976), and has taken steps to guard against *ex parte* contacts in formal agency proceedings.[125] Per-

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[124] For this reason, we do not think our opinion in *Courtaulds (Alabama) Inc. v. Dixon*, 111 U.S.App.D.C. 115, 294 F.2d 899 (1961), should be interpreted to narrow *Sangamon*. In *Courtaulds* it was stipulated that the Federal Trade Commission had considered *ex parte* communications in formulating its final rules defining rayon. 111 U.S.App.D.C. at 120, 294 F.2d at 904. Nonetheless, in upholding the procedures used this court said, "We find no evidence that the Commission improperly did anything in secret or gave to any interested party advantages not shared by all." 111 U.S.App.D.C. at 120-121, 294 F.2d at 904-905. This finding alone distinguishes *Courtaulds* from both *Sangamon* and the instant case, in both of which the substance of the contacts was kept secret. Indeed, the *Courtaulds* court specifically noted that *ex parte* submissions were "canvassed with the appellant, Government spokesmen and others * * *." 111 U.S.App.D.C. at 120, 294 F.2d at 904. *Courtaulds* also contained a footnote distinguishing Sangamon on the ground that the rulemaking in *Courtaulds* did not decide competing private claims to a valuable privilege. 111 U.S.App.D.C. at 120-121 n.16, 294 F.2d at 904-905 n.16.

To the extent this same footnote also suggests that *Sangamon* did not involve rulemaking, it is plainly in error. *See Sangamon Valley Television Corp. v. United States*, *supra* note 118, 106 U.S.App.D.C. at 33, 269 F.2d at 224. Nor, as the Commission suggests here, was *Sangamon* limited to "quasi-judicial" proceedings.

[125] Of course, the Sunshine Act by its terms does not apply here. Its *ex parte* contact provisions are couched as an amendment to 5 U.S.C. § 557, and as such the rules do not apply to

haps more closely on point is Executive Order 11920, 12 WEEKLY COMP. OF PRESIDENTIAL DOCUMENTS 1040 (1976, which prohibits *ex parte* contacts with members of the White House staff by those seeking to influence allocation of international air routes during the time route certifications are before the President for his approval.[126] The President's actions under Section 801 of the Federal Aviation Act [127] are clearly not adjudication, nor even quasi-judicial. Instead, the closest analogue is precisely that of *Sangamon*: informal official action allocating valuable privileges among competing private parties. Thus this is a time when all branches of government have taken steps "designed to better assure fairness and to avoid suspicions

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rulemaking under § 4 of the Administrative Procedure Act, 5 U.S.C. § 553. Moreover, the Act was not in effect at the time of the events in question here.

[126] Sec. 4. Individuals within the Executive Office of the President shall follow a policy of (a) refusing to discuss matters relating to the disposition of a case subject to the approval of the President under section 801 with any interested private party, or an attorney or agent for any such party, prior to the President's decision, and (b) referring any written communication from an interested private party, or an attorney or agent for any such party, to the appropriate department or agency outside of the Executive Office of the President. * * *

Sec. 5. Departments and agencies outside of the Executive Office of the President which regularly make recommendations to the President in connection with the Presidential review pursuant to section 801 shall * * *:

(a) establish public dockets for all written communications (other than those requiring confidential treatment for defense or foreign policy reasons) between their officers and employees and private parties in connection with the preparation of such recommendations[.]

Executive Order 11920, 12 WEEKLY COMP. OF PRESIDENTIAL DOCUMENTS 1040, 1041 (1976).

[127] 49 U.S.C. § 1461 (Supp. V 1974).

of impropriety," White House Fact Sheet on Executive Order 11920 (June 10, 1976), and consequently we have no hesitation in concluding with *Sangamon* that due process requires us to set aside the Commission's rules here.[128]

From what has been said above, it should be clear that information gathered *ex parte* from the public which becomes relevant to a rulemaking will have to be disclosed at some time. On the other hand, we recognize that informal contacts between agencies and the public are the "bread and butter" of the process of administration and are completely appropriate so long as they do not frustrate judicial review or raise serious questions of fairness. Reconciliation of these considerations in a manner which will reduce procedural uncertainty leads us to conclude that communications which are received prior to issuance of a formal notice of rulemaking do not, in general, have to be put in a public file. Of course, if the information contained in such a communication forms the basis for agency action, then, under well established principles,[129] that information must be disclosed to the public in some form. Once a notice of proposed rulemaking has been issued, however, any agency official or employee who is or may reasonably be expected to be involved in the decisional process of the rulemaking proceeding, should "refus[e] to discuss matters relating to the disposition of a [rulemaking proceeding] with any interested private party, or an attorney

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[128] For additional views favoring extension of the *ex parte* prohibition of the Sunshine Act to informal rulemaking, *see* ASS'N OF THE CITY OF NEW YORK, GOVERNMENT IN THE SUNSHINE ACT, *reprinted in Hearings on H.R. 10315 & H.R. 9868 before the House Committee on Government Operations*, 94th Cong., 1st Sess. 254-257 (1975), and *Hearings on the Open Communications Act of 1975, S. 1289, before the Subcomm. on Administrative Prac. & Proc. of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. (1976).

or agent for any such party, prior to the [agency's] decision * * *," Executive Order 11920, § 4, *supra*, at 1041. If *ex parte* contacts nonetheless occur, we think that any written document or a summary of any oral communication must be placed in the public file established for each rulemaking docket immediately after the communication is received so that interested parties may comment thereon. *Compare* Executive Order 11920, § 5, *supra*.[130]

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[129] *See* pp. 50-51 *supra*.

[130] We do not think these reporting requirements will be unduly burdensome. The overall effect of our opinion will be to require procedures similar to those already in effect in the Consumer Product Safety Commission which the head of that Commission has stated are not burdensome. *See Hearings*, *supra* note 128, at 10-39 (statement of Richard O. Simpson, Chairman, Consumer Product Safety Commission). Nor do we think disclosure will have the effect of cutting off information vital to the rulemaking process. *See id.* at 58 (testimony of Dr. Alexander Schmidt, Commissioner of Food and Drugs); *id.* at 170, 172 (statement of Bruce Brennan, Vice President, Pharmaceutical Manufacturers Ass'n). The scheme we require here is also no more burdensome than that required by the Sunshine Act for formal rulemaking, *see* 5 U.S.C. § 557 (d) (1) (C) *as amended*, or by Executive Order 11920, *see* note 126 *supra*. In addition, agency compliance with this opinion would be in accordance with Recommendation 74-4 of the Administrative Conference of the United States which provides:

> 1. In the absence of a specific statutory requirement to the contrary, the following are the administrative materials that should be before a court for its use in evaluating, on preenforcement judicial review, the factual basis for rules adopted pursuant to informal procedures prescribed in 5 U.S.C. § 553: (1) the notice of proposed rulemaking and any documents referred to therein; (2) comments and other documents submitted by interested persons; (3) any transcripts of oral presentations made in the course of the rulemaking; (4) *factual information not included in the foregoing that was considered by the authority responsible for promulgation of the rule or that is proffered by the agency as pertinent to the rule;* (5) reports of any advisory committees; and (6) the agency's concise general statement or final order and any documents referred to therein. References to the "record" or "whole record" in statutes pertaining to judicial review of rules adopted under Section 553 should be construed as references to the foregoing in the absence of a legislative intent to the contrary. The Conference does not assume that the reviewing court should invariably be confined to the foregoing materials in evaluating the factual basis for the rule.

3 RECOMMENDATIONS & REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 49 (1974) (emphasis added; footnote omitted).

For the foregoing reasons, we must consider what steps should be taken to cure the procedural defect introduced by *ex parte* contacts. One option would be simply to vacate all of the rules under review and remand them to the Commission for consideration *de novo*. This approach has two defects, however. First, it is not possible for us to expunge from the Commission's collective memory what was said to it *ex parte*. Consequently, information untested by public scrutiny could influence the outcome of future proceedings if steps are not now taken to put this information on the public record. Second, as discussed in Part V *infra*, we find it possible to uphold the Commission's rules relating to subscription broadcast television on the basis of the public record as it now stands. We further find no indication in the material already submitted to this court that the subscription broadcast rule amendments benefit persons who partici-

Despite what has been said above, it is conceivable that trade secrets or information affecting national defense, if proffered as the basis for rulemaking, should be kept secret. *Cf.* 5 U.S.C. § 552. We do not think any such issue is before us today, and it will be time enough to determine the bounds of any exemption from disclosure when a proper case is presented.

broadcast rules ought, therefore, to remain in effect pending clarification of what was said to the Commission *ex parte*. Such clarification would, of course, require further proceedings to be held to determine what was said to the Commission. Since it does not seem possible for such an inquiry to be limited solely to contacts repated in *ex parte* contacts. We think the subscription garding subscription broadcast television given the overlap between issues and parties in these proceedings, and because it would be useful to remove any possible effect of the *ex parte* contacts in these proceedings, we think the best resolution of the procedural problem we face is to adopt the course taken in *Sangamon* itself. Therefore, we today remand the record to the Commission for supplementation with instructions "to hold, with the aid of a specially appointed hearing examiner, an evidential hearing to determine the nature and source of all *ex parte* pleas and other approaches that were made to" the Commission or its employees after the issuance of the first notice of proposed rulemaking in these dockets. 106 U.S.App.D.C. at 34, 269 F.2d at 225. "All parties to the former proceeding and to the present review may on request participate fully in the evidential hearing," *id.*, and may further participate in any proceedings before the Commission which it may hold for the purpose of evaluating the report of the hearing examiner. The Commission is further instructed to file the supplemented record with this court within 120 days of the date of this opinion, together with its recommendations concerning our disposition of the subscription broadcast television segment of this review.

V. Subscription Broadcast Television

Over six years ago this court rendered its decision in *NATO v. FCC*, *supra*, affirming in all respects subscription broadcast television rules promulgated in the Com-

mission's *Fourth Report and Order*.[131] That inquiry, unlike the subscription broadcast rules here under review, was based on elaborate data generated in a two-year trial of subscription broadcast television in Hartford, Connecticut. Since *NATO* it appears that few, if any, subscription broadcast stations have begun operation on a commercial basis, and consequently the best information available about the general effect of subscription television on conventional broadcasting is that in the *Fourth Report*. Because of these essentially static factual circumstances, it would be inappropriate for us to reopen now questions of the overall rationality of antisiphoning rules as they pertain to subscription broadcast television and, as a result, we agree with a number of petitioners that the only question for review here is the rationality of the amendments to the subscription broadcast television rules announced in Dockets 18397 and 19554. We further hold that *NATO* forecloses general antitrust and First Amendment objections to the subscription broadcast television rules.

The differences between the rules passed on in *NATO* and the present subscription broadcast rules can be quickly summarized. The no-advertising and 90-percent rules remain unchanged. The feature film rules allow an additional year of unrestricted subscription broadcasting after general release and generally relax requirements for subscription broadcasting of films over ten years old.[132] In addition, foreign language films are no

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[131] 15 FCC 2d 466 (1968); *see* pp. 18-20 *supra*.

[132] Originally films could be freely shown only until two years after general release. *Id.* at 597. Films over ten years old could be shown once per month without consulting the Commission. *Id.* Other films could be shown if the Commission was convinced either that they had been offered to broadcast television and refused or that they were unsuitable for broadcast use. *Id.* Since the effect of the present rules is only to delineate certain classes of films as presumptively suitable for

longer covered by the rules and the criterion for subscription showing of films three to ten years old has been modified to allow exhibition when a conventional broadcaster in the market holds a present contractual right to exhibit the film. The rule prohibiting subscription exhibition of series programming [133] has been dropped. The sports rules have also been modified; however, no one here challenges the sports rules as applied to subscription broadcast television.

We turn first to the feature film rules. There is ample evidence in the record supporting the Commission's conclusion that "[f]ew films are televised before they are three years old, and most are four years or older before their first telecast." *First Report and Order, supra*, 52 FCC 2d at 51, JA 75. In particular, we note the extensive surveys of the program suppliers which suggest that the average age of films shown on broadcast television is over five years.[134] Therefore the Commission's further conclusion that the period of subscription viewing of feature films could be extended to three years from date of release without affecting broadcasting exhibition of feature films is clearly reasonable. We also agree with the Commission that no purpose would be served by restricting subscription exhibition of films which could not be siphoned because they were under contract to a broadcaster. Finally, we do not think it unreasonable for the Commission to categorize other films unsuitable for broadcasting through its foreign language and after-ten-years rules. Even a challenger of these rules, Metro-

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or unwanted by broadcast television, it is not clear how much practical difference there would be between the operational impacts of the two rules.

[133] "No series type of program with interconnected plot or substantially the same cast of principal characters shall be broadcast." *Id.* at 598.

[134] *See* JA 383, 555-562.

media, could only demonstrate that 23 percent of older films were suitable for broadcasting.[135] Because the films to be protected constitute only a small fraction of the total available pool, a blanket prohibition of subscription use of these films would raise serious questions of overbreadth. Finally, we are unwilling to review line-drawing performed by the Commission unless a petitioner can demonstrate that lines drawn, for example the ten-year age, are patently unreasonable, having no relationship to the underlying regulatory problem.

We also affirm the Commission's deletion of the series programming rule. The Commission's discussion in its *Second Report and Order*, ——FCC 2d——, 35 P & F RADIO REG. 2D 767 (1975), JA 131, concludes that conditions now existing in the program production industry are adequate to supply series programming for both cable and conventional broadcast use, a conclusion which we agree is amply supported by public comments.[136] Further, as we indicated in discussing the pay cable rules, the series restrictions reflect a policy completely opposed to that adopted contemporaneously in the Prime Time Access Rules proceedings and consequently could not have been affirmed without a more detailed explanation than the Commission has so far proffered.[137]

Although the public record amply supports the subscription broadcast television rule amendments, these amendments cannot be finally approved until this court has had the benefit of the further proceedings set out in

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[135] *See First Report and Order, supra* note 2, 52 FCC 2d at 12, JA 36.

[136] *See, e.g.*, Joint Comments of Columbia Pictures Industries, Inc., *et al.*, in Docket 19554, at 3-6 (May 23, 1975), JA 890-893; Transcript of Oral Argument before the Commission in Docket 19554, JA 1184-1187.

[137] *See also* note 5 *supra*.

Part IV *supra*. Nonetheless, as we have said in Part IV, it seems unlikely that *ex parte* information will require vacation of the subscription broadcast television amendments, and we therefore hold that the amendments may remain in effect pending our final order in this segment of the case.

VI. Conclusion

Our resolution of the various issues discussed in Parts I through V of this opinion require the following dispositions:

(1) The regulations adopted in the *First Report and Order*, 52 FCC 2d 1 (1975), and the regulations adopted in the *Memorandum Opinion and Order*, 23 FCC 2d 825 (1970), are set aside insofar as they apply to cable television.[138]

(2) The regulations adopted in the *Memorandum Opinion and Order*, 54 FCC 2d 797 (1975), are set aside.

(3) The repeal of regulations announced in the *Second Report and Order*, —— FCC 2d ——, 35 P & F Radio Reg. 2d 767 (1975), is affirmed in all respects.

(4) The petitions for review of the Commission's refusal to waive its pay cable feature film rules, announced in *In re Home Box Office, Inc.*, 51 FCC 2d 317 (1975), are dismissed as moot.

(5) The rules adopted in the *First Report and Order*, *supra*, are affirmed insofar as they apply to subscription broadcast television subject to the further proceedings ordered in Part IV *supra*.

(6) The Commission is hereby ordered to undertake the additional proceedings set out in Part IV *supra*.

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[138] *See* note 27 *supra*.

(7) The Commission is hereby further ordered to terminate its proceedings in Docket 20402 (concerning program exclusivity) within 180 days of the issuance of this order.[139]

So ordered.

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[139] *See* note 4 *supra*.

WEIGEL, *District Judge, concurring*: In joining the court's opinion, I wish to emphasize the view that the Federal Communications Commission lacks the power to control the content of programs originating in the studios of cablecasters. Such programs involve neither retransmission of signals received over the air from conventional television broadcasting nor transmission over television broadcasting frequencies. They are offered to users of television sets on terms the users are free to accept or reject.

It seems to me that if there could be any governmental interest justifying this species of censorship, it is an interest which Congress has not empowered the Commission to assert. In relation to cablecasting, the power is so fraught with the potential for impingement upon First Amendment rights that it should not be sanctioned by implication.

The holdings in *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968), *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972), and other cases in their line, when read and measured on the particular facts in each, seem to me to be consistent with the views here expressed.

Mr. Chief Justice Burger, concurring in the result in *Midwest*, upheld Commission action regulating CATV systems which made extensive use of television broadcasting signals. In his opinion, after noting that that "case present[ed] questions of extraordinary difficulty and sensitivity in the communications field" (406 U.S. at 675), the Chief Justice declared his view that the Commission's position strained "the outer limits of even the open-ended and pervasive jurisdiction that has evolved by decisions of the Commission and the courts." (*Id.* at 676.) In my view, Commission control of program content of cablecasting goes well beyond those outer limits.

Appendix B

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1280 *et al.*

HOME BOX OFFICE, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

PROFESSIONAL BASEBALL, *et al.*, INTERVENORS

Argued April 20, 1976

Decided March 25, 1977

Opinion Concurring Specially Filed May 20, 1977

Before WRIGHT and MACKINNON, *Circuit Judges*, and WEIGEL,* *District Judge*.

Opinion Concurring Specially filed by *Circuit Judge* MACKINNON.

MACKINNON, *Circuit Judge*, concurring specially: Belatedly, I file the following special concurrence.

This particular rulemaking proceeding began with a number of petitions by broadcast interests for reconsideration of earlier Docket orders and requested that certain existing rules of a highly restrictive nature be applied to all cablecasting programming. The Commission responded with:

> *Notice of Proposed Rule Making in Docket 19554* is hereby announced. All interested persons are invited to

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* Of the United States District Court for the Northern District of California, sitting by designation pursuant to 28 U.S.C. § 292(d).

> file written comments on the rule making proposals on or before September 15, 1972 and reply comment on or before September 29, 1972. . . . In reaching a decision in this matter, the Commission may take into account any other relevant information before it, in addition to the comments invited by this *Notice*.

35 FCC 2d 899, J.A. 7. This notice, including the provision that "the Commission may take into account any other relevant information . . . in addition to the written comments," constituted the initiation of what has come to be known as informal rulemaking, under 5 U.S.C. § 553(b).[1] Under *informal* rulemaking, the Commission would not be required to comply with the procedural requirements of sections 556 and 557, which, according to the provisions of section 553(b) and (c), apply to situations where rules are required by statute to be made on the record, after opportunity for an agency hearing. The latter category of agency action refers to *formal* rulemaking, and also pertains to adjudication required by statute to be determined on the record after opportunity for an agency hearing (*see* section 554(b)).

Recently, in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), a case dealing with informal

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[1] 5 U.S.C. § 553(b) (1970) provides:

> General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—
>
> (1) a statement of the time, place, and nature of public rule making proceedings;
>
> (2) reference to the legal authority under which the rule is proposed; and
>
> (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.
>
> Except when notice or hearing is required by statute, this subsection does not apply—
>
> (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or
>
> (B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

rulemaking, the Supreme Court held that where there was a statutory requirement that certain findings precede administrative action and the specific findings had not been made, "the full administrative record that was before the Secretary at the time he made his decision," 401 U.S. at 420, had to be made available to the reviewing court.

To the extent that our *Per Curiam* opinion relies upon *Overton Park* to support its decision as to *ex parte* communications in this case, it is my view that it is exceeding the authority it cites because here there is no statutory requirement for specific findings nor are the regulations limited to the full administrative record. And our opinion follows up this excessive reliance on *Overton Park* by an overly broad statement of the rule. I refer particularly to the following:

> Once a notice of proposed rulemaking has been issued, however, any agency official or employee who is or may reasonably be expected to be involved in the decisional process of the rulemaking proceeding, should "refus[e] to discuss matters relating to the disposition of a [rulemaking proceeding] with any interested private party, or an attorney or agent for any such party, prior to the [agency's] decision * * *," Executive Order 11920, § 4, *supra*, at 1041. If *ex parte* contacts nonetheless occur, we think that any written document or a summary of any oral communication must be placed in the public file established for each rulemaking docket immediately after the communication is received so that interested parties may comment thereon.

Slip op. at 97-98. I agree that this is the proper rule to apply in this case because the rulemaking undeniably involved competitive interests of great monetary value and conferred preferential advantages on vast segments of the broadcast industry to the detriment of other competing business interests. The rule as issued was in effect an adjudication of the respective rights of the parties vis-a-vis each other. And since that is the nature of the case and controversy that we are deciding and to which our opinion is limited, I would make it clear that that is all we are deciding. I would not make an excessively broad statement to include *dictum* that could be interpreted to cover the entire universe of informal rulemaking. There are so many situations

where the application of such a broad rule would be inappropriate that we should not paint with such a broad brush.[2]

[2] Professor Kenneth Culp Davis in his *Administrative Law Treatise* (1958) points out some of the advantages of informal rulemaking and its wide scope:

§ 6.02. Written Presentations, Consultations, and Conferences

Informal written or oral consultation with affected parties or with advisory committees is the mainstay of rule-making procedure. The principal requirement of the APA is "opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner." The Model State Act calls for "opportunity to submit data or views orally or in writing."

The consultative process may take many forms. The administrator or staff member may talk over possible rules with selected parties, by telephone or in person, singly or in groups, by systematically and formally arranged conferences or interviews or in connection with fortuitous contacts occasioned by other business. To frame one set of rules the ICC once conducted 89 informal conferences attended by 1,740 individuals representing 1,286 carriers; to frame another set the Commission sent an interviewer through fifteen states to talk with representatives of motor carriers, members of state commissions, executives of insurance companies, and insurance agents and brokers, and then later conferences were held with committees representing the bus industry, the truck industry, and insurance associations. Sometimes consultation involves collaboration in planning and drafting, as when technical representatives of shipping companies cooperate with technicians of the Customs Bureau in preparing rules concerning construction of vessels. The Emergency Price Control Act provided that "before issuing any regulation or order . . . the Administrator shall, so far as practicable, advise and consult with the representative members of the industry. . . ."

When parties are too numerous and individuals may not be representative, some organization often supplies what is needed. For instance, in the FCC "regular contacts are maintained with well-established trade associations and some licensees and carriers. If a matter involving an aviation radio problem is under consideration, for example, the Commission employee invariably communicates with a representative of Aeronautical Radio, Inc., a non-profit cooperative association whose members are the leading air transportation lines. Whenever the Commission is considering the promulgation of regulations dealing with common carriers, it always attempts to obtain the cooperation of State regulatory bodies and the National Association of Railroad and Utilities Commissioners . . . in most circumstances the Amateur Radio Relay League and the National Association of Broadcasters can effectively represent their membership." The Attorney General's Committee admiringly described the rule-making methods of the Board of Governors of the Federal Reserve System: "The practice of the Board

[Continued]

In addition section 555(b), which applies to the entire act, authorizes interested parties to confer with all responsible employees of any agency:

> . . . So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with any agency function. . . .

5 U.S.C. § 555(b). Specifically, I would restate the opening

[2] [Continued]

. . . is especially noteworthy because of the Board's virtually complete reliance upon conferences rather than hearings as a means of enabling affected parties to participate in the rule-making process. Over a period of time the Federal Reserve System has developed a procedure of consultation and conference . . . Outside views came from replies to letters which the Board sends out, and orally at conferences. Usually statements are put in writing and a stenographic report of conferences is made. Frequently, the interchange of data and views is facilitated by mimeographing them, both within and without the staff. The procedure is flexible, thorough, adapted to bringing the knowledge of an expert agency to bear upon its rule-making problems, and fair. . . ."

The Attorney General's Committee generalized concerning conferences: "The practice of holding conferences of interested parties in connection with rule-making introduces an element of give-and-take on the part of those present and affords an assurance to those in attendance that their evidence and points of view are known and will be considered. As a procedure for permitting private interests to participate in the rule-making process it is as definite and may be as adequate as a formal hearing. If the interested parties are sufficiently known and are not too numerous or too hostile to discuss the problems presented conferences have evident advantages over hearings in the development of knowledge and understanding."

The superiority of the conference over the hearing has been convincingly described by a commentator: "Let it not be assumed too easily that hearings are a significant protection against bureaucratic absolutism. To a slothful administrator a hearing precedent to regulation may be a God-given opportunity to avoid work and thought. He need only listen with impassively judicial countenance and then forget all he has heard. It is the conference with its give and take ideas and information, with its possibilities of detailed exporation of minor points and hidden corners which stirs the mind to action. Moreover, there are demonstrably situations where hearings produce little if anything of value."

1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 6.02, pp. 363-365 (1958) (footnotes omitted).

clauses of the above quoted provision of our opinion to restrict it to the facts of the case before us, *i.e.*, to read substantially as follows:

> Once a notice of proposed rulemaking has been issued that will involve competing private claims to a valuable privilege [3] or selective treatment of competing business interests of great monetary value . . . etc.

There are several other statements in this section of our opinion which are too broad and should be similarly limited to the precise type of case currently before us.

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[3] *See* Sangamon Valley Television Corp. v. United States, 106 U.S.App. D.C. 30, 43, 269 F.2d 211, 224 (1959).

FCC 75-369

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
AMENDMENT OF PART 76, SUBPART G, OF THE COMMISSION'S RULES AND REGULATIONS PERTAINING TO THE CABLECASTING OF PROGRAMS FOR WHICH A PER PROGRAM OR PER CHANNEL CHARGE IS MADE	Docket No. 19554
AMENDMENT OF SECTIONS 73.643(B)(2) AND 74.1121(A)(2) OF THE COMMISSION'S RULES AND REGULATIONS PERTAINING TO THE SHOWING OF SPORTS EVENTS ON OVER-THE-AIR SUBSCRIPTION TELEVISION OR BY CABLECASTING	Docket No. 18893

FIRST REPORT AND ORDER

(Adopted March 20, 1975; Released April 4, 1974)

BY THE COMMISSION: COMMISSIONER HOOKS CONCURRING IN THE RESULT; COMMISSIONER ROBINSON DISSENTING IN PART AND CONCURRING IN PART AND ISSUING A STATEMENT.

INTRODUCTION

1. This proceeding, commenced by a *Notice of Proposed Rule Making* released July 24, 1972,[1] and expanded in scope by a *Further Notice of Proposed Rule Making* released August 12, 1974,[2] inquiries into how the Commission can best regulate subscription cablecast cable television system operations and over-the-air subscription television stations in the public interest. Or, put more concretely, how can these operations be so regulated that their subscribers receive the maximum quantity, quality, and diversity of programming without the service they receive impairing the service supplied to the viewing public by conventional advertiser supported television broadcast stations.

2. The discussion below is subdivided as follows:

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[1] *Notice of Proposed Rule Making and Memorandum Opinion and Order in Docket 19554*, FCC 72-652, 35 FCC 2d 893 (1972).

[2] *Further Notice of Proposed Rule Making and Order for Oral Argument in Docket 19554, FCC* 74-878, 48 FCC 2d 453 (1974).

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3. Subscription television broadcasting involves the broadcasting of a scrambled television signal which, on payment of a fee, subscribers are authorized to unscramble. Subscription cablecasting involves the closed-circuit cable television system distribution of non-broadcast programming for which the cable television system subscriber is charged an additional program or channel fee beyond the regular monthly fee for the system's television signal reception service. Subscription cablecasting may either be undertaken by the system operator or by an independent entrepreneur, who contracts with the system operator for the distribution of his programming. The Commission has, in its regulations, distinguished between subscription cablecasting and regular cable casting for which no additional per-program or per-channel charge is made.

4. Technically, the systems for distributing subscription cablecasting, guarding against unauthorized access to the programming, and billing for it are varied. Perhaps the simplest method is to distribute the programming on one or more of the channels on a cable television system that cannot be received on conventional television receiving sets. Those system subscribers who wish to receive the additional programming are supplied with a device which converts the programming to a channel receivable on a conventional television set. Those ordering the service are typically billed $5–7 monthly for the additional channel of programming received. Other systems in use or under development permit a separate charge to be made for each program viewed. These systems either require the subscriber to purchase a ticket for each program in advance, which, when inserted into the decoding device in the subscriber's home, provides access to the programming or utilizes the return communications capacity of the system or a telephone connection to activate a central computer facility which releases the programming through the subscriber's decoding device and performs the billing functions. At the time of the second oral argument in this proceeding (October 23–25, 1974), there were approximately 100,000 subscribers in the United States receiving pay cable television service.

5. As with subscription cable systems, there are a variety of technical systems under consideration for use in connection with subscription television stations. Whatever the specific configuration of the system, however, it is basically intended to permit access to subscription programming only by those who have paid for it. Although no subscription television station is now on the air broadcasting subscription

programming, applications have been granted to permit such operations in Newark, New Jersey; Milwaukee, Wisconsin; and Boston, Massachusetts. Applications are pending to operate subscription stations in a number of other cities.

6. Although pay cable television system operations are of relatively recent origin and there are no operating STV stations, efforts have been in progress for almost forty years to establish a legally, technically, and economically sound system for the mass distribution of feature films and other programming through a system of subscription television. The Commission's concern with subscription television issues dates back to at least 1950, when the WOR–TV facilities in New York City were used for an early pay television test. In 1952, Commission approval for a nationwide system of subscription television was sought. In 1955, a rule making proceeding was commenced to look into the matter. In 1961, an experimental over-the-air subscription operation was authorized to operate in Hartford, Connecticut.[3]

7. Debate in these early proceedings appears to have focused largely on the following questions:

—If subscription service were instituted, would the public continue to receive the same service it had previously obtained free?
—Would part of the public, including especially the poor, be deprived of programming to which it previously had free access?
—Would subscription television cause the closing of theatres, sports arenas, concert halls, and other places of public assembly, adding to the decay of urban centers?
—Would subscription television operations occupy frequency space that might be better used for other purposes?
—Would the advent of pay television operations result in impairment or the total destruction of free broadcast operations?
—Would subscription service result in the creation of new and diverse programming?
—Would it contain more educational and culturally enlightening programming than is found on free television?
—Would it enable people to see movies, sports, and other entertainment in their homes at lower cost than they would incur in going out to see them?
—Would the competition provided to conventional television result in an upgrading of the programming found on conventional television?
—Is there a public interest in providing a forum for the televising of programming free from the influence of commercial advertisers?
—Would it provide a method for distributing programming that did not have mass audience appeal?

[3] The early history of the Commission's concern with this issue is reflected in the following documents: *Notice of Proposed Rule Making in Docket 11279*, FCC 55–165, 20 F.R. 988 (1953); *Notice of Further Proceeding*, FCC 57–530, 22 F.R. 3758 (1957); *First Report in Docket 11279*, FCC 57–1153, 23 FCC 532 (1957); *Second Report in Docket 11279*, FCC 58–182, released February 27, 1968; *Third Report in Docket 11279*, FCC 59–217, 26 FCC 265 (1959); *Further Notice of Proposed Rule Making and Notice of Inquiry in Docket 11279*, FCC 66–268, 7 RR 2d 1501, released March 24, 1966; *Order Setting Oral Argument and Second Further Notice of Proposed Rule Making in Docket 11279*, FCC 67–891, released July 31, 1967; *Report to the FCC by its Subscription Television Committee*, FCC 67–819, 10 RR 2d 1617, released July 14, 1967.

—Under the free enterprise system, do not program producers have a right to market their product through avenues other than on conventional television?
—Would not a system of direct payment television be preferable to a government funded and influenced system of public broadcasting?
—Would not the development of a pay system of program distribution help to cut back the network domination of program production and dissemination?
—Would not rules limiting the operation of pay television systems violate the First Amendment?

8. In its *Fourth Report and Order in Docket 11279*,[4] released in December of 1968, the Commission concluded that subscription television operations subject to appropriate regulation, could add significantly to the quality and diversity of television programming available to the American public and rules were adopted authorizing and regulating over-the-air subscription television station operations.

9. The rules adopted regulating STV operations essentially provided that:

—Sports events regularly telecast in the community during the preceding two years may not be shown;
—feature films more than two years old may not be shown, except that 12 films a year that are more than 10 years old may be shown;
—no series type of program may be shown;
—commercial advertising announcements may not be shown; and
—no more than 90 percent of the total programming carried may consist of feature films and sports events combined.[5]

10. Although in Docket 11279 there was some mention of wired pay television systems, its principal focus was on over-the-air operations. On December 12, 1968, the same day the over-the-air subscription television rules were adopted, the Commission issued its *Notice of Proposed Rule Making and Notice of Inquiry in Docket 18397*,[6] commencing a broad ranging inquiry into the CATV industry and its regulation. In this document, the subject of pay television operations received only brief and passing mention. Subsequently, the Commission adopted rules in Docket 18397 regulating and to some extent requiring cable system program origination.[7] In response to petitions for reconsideration of this decision, rules virtually identical to those earlier applied to over-the-air subscription television were applied to cable program originations for which a "per-program or per-channel charge is made." [8]

11. In response to this action, further reconsideration petitions were received. The principal requests came from the Association of Maximum Service Telecasters, urging generally that the rules should be applied to all cablecast programming regardless of the absence of a

[4] FCC 68–1174, 15 FCC 2d 466 (1968).
[5] *Id.* The rules governing the presentation of sports programming on over-the-air subscription television were subsequently modified. The principal change being a prohibition against subscription use of sports events regularly telecast in the community during the preceding *five* years. *Report and Order in Docket 18893*, FCC 72–263, 34 FCC 2d 271 (1972).
[6] FCC 68–1176, 15 FCC 2d 417 (1968).
[7] *First Report and Order in Docket 18397*, FCC 69–1170, 20 FCC 2d 201 (1969).
[8] *Memorandum Opinion and Order in Docket 18397*, FCC 70–677, 23 FCC 2d 825 (1970).

per-program or per-channel charge, and by the Motion Picture Association of America, alleging that the rules were overly restrictive and would aggravate the already difficult economic situation of motion picture film producers by denying them an outlet for their feature films. The MPAA petition received strong support from the United States Department of Justice, which asked that the rules be eliminated or that less anticompetitive rules be adopted. The National Association of Theatre Owners, alleging that it was not aware that subscription rules were under consideration in Docket No. 18397, did not seek reconsideration of the rules until after they were re-codified in connection with the February 1972, *Cable Television Report and Order*.[9] In its reconsideration petition, NATO argued that the rules had been adopted in violation of the Administrative Procedure Act because proper notice had not been given and that the growth of pay cable operations threatened the continued viability of theatre operations as well as the restaurants and other businesses that depend on theatre patrons for their survival.[10]

12. With this background in mind, the present proceeding was commenced, both to lay to rest all questions as to whether the proper procedure had been followed in adopting the rules and to ascertain whether the rules, originally formulated without regard to cable television operations, were subject to improvement. The Commission indicated that it felt the central issue was not the desirability *vel non* of cable pay TV, but rather "how pay-cablecasting can best be regulated to provide a beneficial supplement to over-the-air broadcasting without at the same time undermining the continued operation of that 'free' television service." In addition to addressing this general issue, comments were invited with respect to the following specific questions:

(a) What are the legal, technical, and economic differences between over-the-air subscription television and pay cablecasting?

(b) Are there, as the Department of Justice suggests, means of protecting the viewing public by less restrictive means than the existing rules?

(c) Are the rules appropriate for and how should they be administered with respect to access and leased channel cablecasting for which there is a per-program or per-channel charge and not subject to the control of a cable television operator?

(d) Have there been significant and relevant changes in the motion picture industry that should be reflected in the rules? [11]

13. With a decision in this proceeding not yet having been made, the Commission concluded it would be advantageous to receive additional written and oral comment in this proceeding. By its *Further Notice of Proposed Rule Making and Order for Oral Argument*,[12] the Commission requested the comment of interested parties on a number of specific rule making proposals relating to the feature film and sports rules. In addition the scope of the proceeding, previously concerned only

[9] FCC 72–108, 36 FCC 2d 141 (1972).
[10] NATO also questioned the jurisdiction of the Commission to adopt rules regulating subscription cablecasting operations and sought judicial review of their adoption. *National Association of Theatre Owners v. FCC*, Docket 18397, 420 F. 2d 194 (D.C. Cir. 1969), cert. *denied*, 397 U.S. 92 (1970).
[11] *Notice of Proposed Rule Making and Memorandum Opinion and Order in Docket 19554, Supra* note 1, at 898.
[12] *Supra* note 2.

with subscription cablecasting regulation, was expanded to consider changes in the rules applicable to subscription television stations.

14. The specific alternative proposals on which additional comment were sought are set forth more fully in the *Further Notice* but briefly included the following with respect to feature films:

(a) a rule permitting pay use of films until they are 3, 4, or 5 years old;

(b) a rule permitting pay use of a film for a fixed period (9, 18, or 24 months) after first pay use.

(c) a rule prohibiting pay use of all but a fixed number (10?, 20?, 30?) of films between two and ten years old. Those "wild card" films available for use as an exemption to the basic prohibition would be available for pay use for a fixed period of time after first pay use.

(d) a rule prohibiting subscription television or broadcast television from obtaining exclusive use of a feature film for more than one year at a time and requiring that use in one medium be followed by use in the other medium.

15. Specific proposals were also set forth regarding the manner in which sports programming should be regulated. The existing rule essentially provides that sports events may not be subscription cablecast if televised "live on a non-subscription, regular basis in the community during the two years preceding their proposed cablecast." In practice the rule works as follows: events are broken into categories of specific and non-specific events. Specific events are generally those specifically identifiable by name and significance, *e.g.*, the Super Bowl or the World Series. Non-specific events would generally be regular season games—the 162 regular season games of major league baseball or the 82 regular season games of a NBA basketball team. Application of the rule to specific events is relatively simple. If the event was on free television in the community during each of the two preceding years, it may not be shown on a pay basis. If the event was televised in only one of the two years, that is not considered "regularly" telecast and the event is available for pay use. Thus, in actuality the event need be off free television only one year before it is available on a pay basis.

16. Non-specific events are further categorized in accordance with existing sports and broadcast practice. Each separate category, as for example home games or away games, is then looked at separately. If a "substantial" number of games in the category were broadcast in each of the preceding two years, then none of the games in that category may be used on a pay basis.

17. Finally, a separate rule restricts use of specific events like the Olympics, which do not occur every year but which were telecast when the event last occurred.

18. As the result of changes adopted in Docket 18893,[13] the rules governing the use of sports programming on over-the-air STV stations are somewhat different than the cable rules. Although the rules basically follow the same concepts, they differ in the following respects:

—no event televised in the preceding *five* years may be used on a pay basis,

[13] *Report and Order in Docket 18893*, FCC 72-263, 34 FCC 2d 271 (1972).

—"regularly" is defined as telecast in *any one* of the preceding five years in contrast to the prior rule requiring use in *each* of the preceding years,

—new events never previously telecast are not immediately available for pay use if they are the result of a restructuring of the sport,

—the rules are applied to events that might be used on a pay basis on a same day delayed basis as well as to live events.

19. With respect to this existing pattern of regulation, we sought comment on the following specific questions:

—what should be the definition of a "substantial" number of games?

—under the rules, events must be placed in categories. Among the categories are home games, away games, and games of the week. Do the rules now permit or should they permit additional categories such as weekend and weekday games, day and night games, and East and West Coast games? If there are additional categories, what criteria should be used in establishing the categories? What if events fall into more than one category?

—should all sports be treated alike or should there be distinctions between professional and amateur sports, major sports and minor sports, team sports and individual sports?

—generally, should the changes adopted in Docket 18893, *supra*., which are now applicable only to STV stations be applied to pay cablecasting? [14]

20. Finally, with respect to the manner in which use of non-specific events should be regulated, we questioned whether it would be possible to develop rules 1) permitting subscription use of all events for which local broadcasters had a right of first refusal at prices consistent with those paid for similar events and which had not been accepted for broadcast use, or 2) permitting subscription use of at least a percentage of those events in a category of which a substantial number but not all were being broadcast.

21. The scope of the proceeding was further expanded to give specific consideration to two further matters not previously considered. The first related to the alleged warehousing of feature film product. During the earlier course of this proceeding, pay cable interests had expressed their concern that the intended operation of the existing rules was being frustrated by the pre-emptive purchase of feature films by national television networks in an anti-competitive effort to deprive pay operations of feature films and so drive from the market at an early date a potential new competitive force. It was said that the networks were purchasing films with exclusive rights against pay use, before the films were two years old and even though they did not themselves intended to make use of the films until two or three years after the rights were initially obtained. Comment was sought on whether rules should be adopted by the Commission regulating such film purchasing practices.

[14] *See* paragraph 24 of the *Further Notice*, *supra* Note 2. We stated in footnote 11 of that document that the remaining petitions for reconsideration of our *Report and Order in Docket 18893*, FCC 72-263, 24 FCC 2d 271 (1972), would be considered in this proceeding. The portions of those petitions which remain pending relate to the STV sports rules. We have considered the petitions as part of our general consideration of the STV rules and will therefore terminate the proceeding in Docket 18893.

22. The final matter on which comment was sought was prompted by a rule making petition filed by the National Association of Theatre Owners. It concerned the question of whether rules should be adopted requiring persons commencing pay cable operations to give advance notice to the Commission so that the Commission would be informed as to growth and development of such operations.

SUMMARY OF COMMENTS

23. Initial comments and reply comments in this proceeding were filed November 1 and November 29, 1972, respectively. Oral argument before the Commission *en banc* was held on November 5, 6, and 7, 1973. Comments and reply comments in response to the *Further Notice* were filed September 23 and October 4, 1974, with the second oral argument taking place October 23, 24, and 25, 1974. In response to the initial *Notice*, some 40 comments and reply comments were received totaling over 800 pages. Some 56 persons appeared at the initial argument. In response to the *Further Notice*, comments from over 100 persons were received totaling over 1,500 pages. Eighty-two individuals appeared and spoke at the second oral argument.

24. For purposes of reviewing the comments submitted, we have found it useful to divide them into the following categories:

1. Broadcast television
2. Broadcast subscription television
3. Cable television
4. Subscription cable television entrepreneurs
5. Motion picture and television program production industry
6. Sports interests
7. Theater owners and operators
8. Miscellaneous individuals and groups

Broadcast Television

25. Comments were received from 14 broadcast interests including comments from the National Association of Broadcasters, the Association of Maximum Service Telecasters, and the three major networks—ABC, CBS, and NBC.

26. Each of the broadcast parties reiterates the basic arguments against the initiation of direct payment forms of television program distribution: that the subscription method of distribution carries with it sufficient economic potential for it to out-bid and remove programming from over-the-air conventional or free television, forcing viewers to pay a direct charge for what it now obtains free, depriving those unconnected to the system and those without money to pay for the programming of access to it, and impairing the ability of free television to originate local programming and news of service to the public.

27. Many of the broadcast interests argue that cable television unfairly competes with broadcast television because cable operators are permitted to carry broadcast television signals for which they pay nothing.[15] Even assuming that the pending copyright legislation is

[15] In its comments, CBS stated that if cable television were required to pay its fair share for the television programming it carries, antisiphoning measures would be undesirable and inconsistent with our system of free enterprise.

passed by Congress, the compulsory license fee contained in the proposed legislation is only a token payment and would not alter the unequal competitive status enjoyed by the cable industry. Additionally, it is argued that since cable operators are not obligated to provide news and public interest type programming as are broadcasters, cable is able to channel more of its revenues into bidding up the price of programming than are broadcasters. Because of these competitive advantages, it is asserted that pay interests ought not be allowed to siphon programming away from broadcast television. The present programming restrictions are a proper *quid pro quo* for cable's free use of broadcast signals, and necessary to provide broadcasters with the revenue needed to support unprofitable news and public interest programs.

28. Some of the comments are critical of the cable industry for failing to fulfil its promise to supply its subscribers with innovative and diverse programming. It is said that the present rules should be retained to encourage diverse programming and discourage reliance on feature films and sports programs which are already abundantly supplied over conventional television. The rules, it is argued, should encourage cable to supplement conventional television, not siphon away its programs.

29. With regard to the economic ability of pay cablecast operations to outbid advertiser supported television for popular program material, several parties point out championship boxing bouts and Evel Knievel's recent stunt as illustrations of how the economic clout of pay interests can remove such events from broadcast coverage and restrict viewers to only those who can get to a closed circuit outlet and can afford to pay the price of admission. To indicate the extent of this economic clout, ABC cites the March, 1974, Report of Standard Research Institute, which predicted that by 1980 the number of pay subscribers, both cable and STV, will reach 11,805,000, and pay revenue will reach $1.67 billion; more than the combined program expenses of the three television networks in 1973. In its illustration of the point, NBC uses the following examples: Six million cable homes could raise over $43 million to compete for pro football rights if $1 were charged for each regular game and 25 percent of subscribers watched, and $3 were charged for the Super Bowl and 50 percent of subscribers watched. According to the NAB comments, by serving four million subscribers and imposing an additional monthly fee of $1, cable television could take in $1 million more revenue than free television derives from its broadcast of all NFL games and the World Series.

30. The most comprehensive attempt to develop a methodology for making this comparison is contained in the reply comments of the American Broadcasting Company. It there developed a formula for estimating the pay cable dollars available for the purchase of any particular program. The formula, in somewhat simplified terms, is as follows:

> (Total households) x (percent of households with tv sets) x (percent of households with tv sets that are cable tv subscribers) x (percent of cable tv subscribers that have pay cable option available) x (percent of subscribers with pay option that are pay subscribers) x (percent of pay subscribers that view program in

question) x (charge to subscriber for program) x (percent of subscription charge passed through to program supplier) = (total national pay cable dollars available for the purchase of program in question).

ABC's own assumptions as to the state of the pay cable television industry in 1980 are as follows:

Total household		75,400,000
TV set penetration	percent	97
CATV penetration	do	35
CATV penetration with pay TV potential	do	80
Pay subscriber penetration of systems with pay potential	do	15
Percent of pay subscribers viewing program	do	50
Charge to subscriber for program	dollars	2.25
Percent of pay fee collected passed on to program producers	percent	35

In the circumstance posited by ABC, slightly more than 1.5 million homes would pay $2.25 each for a particular program making available slightly more that $1.2 million dollars to the pay cable industry for the purchase of the program in question. This, ABC suggests, compares with the $1.5 million dollars a network might pay for two showings of a "blockbuster" feature film like *Love Story* during a five-year period, and with the $1 million dollars that might be paid for a movie of somewhat less appeal.

31. In sum, and based on the kind of analysis presented by ABC, the broadcast interests conclude that pay cable operations will have more money than television stations or television networks to purchase programming and, being creatures of a competitive economic system, will inevitably purchase much of the best programming now broadcast on free television and leave free television only with what is left over. The growth projections of NCTA and other cable interests are discounted by broadcasters who claim the projections look only to the short run and incorrectly assume that penetration rates and subscriber rates will remain static. They assert that once the pay interests obtain a foothold, the industry will grow rapidly, the percentage of potential subscribers who actually subscribe will increase because good programs will have been siphoned away from conventional broadcasting, and subscription rates will go up.

32. Because of this potential for program siphoning from free to pay television, the broadcast interests conclude that there is a clear need for regulation. Ample legal authority to enact regulations is said to be found in *U.S. v. Southwestern Cable Company*, 392 U.S. 157 (1968) upholding the Commission's authority to regulate cable television broadcast signal carriage; in *General Telephone Company of California v. FCC* 413 F. 2d 390 (D.C. Cir. 1969) upholding the Commission's authority to regulate the provision of cable television facilities by telephone common carriers; and in *National Association of Theatre Owners v. FCC*, 420 F. 2d 194 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 92 (1970) affirming the Commission's authority to authorize and regulate over-the-air subscription television stations. The broadcast interests contend that, at least, regulation of program siphoning is reasonably ancellary to the performance of the Commission's duties. The NAB and others assert that the Communications Act of 1934 is a statutory mandate to prevent program siphoning in order to protect the public interest and facilitate an efficient, nationwide communications

network. Furthermore, it is argued by some that since the 1934 Act contemplated only conventional television service, the Commission should obtain Congressional guidance before it promulgates any rule which would permit pay interests to use programming now found on conventional television.

33. All of the broadcast interests urge that the existing rules be retained or strengthened. With regard to feature films, the broadcasters claim that pay interests now have available to them all of the film product that they need. ABC points out that in the 1973 oral arguments, cable interests stated that they needed 4–8 feature films each month to operate successfully. Citing statistics from Paul Kagan Associates, publisher of *The Pay TV Newsletter*, ABC states that pay interests now have available over 20 feature films each month. The availability of adequate film product is demonstrated by the dramatic growth of the pay cable industry—pay cable subscribers have increased from 16,000 in March of 1973, to over 100,000 as of September, 1974. Because of the danger of siphoning and the lack of need for more product by pay interests, the broadcast interests are unanimously opposed to any relaxation of the feature film rule.

34. Although the broadcast parties generally urge that the existing rules be retained, the following specific alterations are suggested. The existing rules apply only to cablecast programming distributed for a per-program or per-channel charge. It is suggested that the rules ought also to apply to cablecast programming distributed without any additional charge on the grounds that the same potential for program siphoning exists here as in the per-channel or per-program charge area. It is also suggested that pay operations be limited to one channel on cable television systems, and that pay cable be required to originate a substantial number of hours of non-pay programming to equalize pay cable's role with that of STV. ABC proposes a modification to the present two-year feature film rule. It would require that prior to the pay exhibition of a feature film, such film must be licensed for conventional television broadcast not later than 25 to 30 months after theatrical release. This would prevent rest and re-release and would insure that feature films reach conventional television within a short period after their theatrical run.

35. All four feature film proposals included in the Commission's *Further Notice* are rejected because the broadcasters claim they would result in delay between theater and conventional television exhibition at best, and at worst would completely remove some films from the television market. It is asserted that the average time taken by feature films to reach conventional television put forth by the program producers is misleading because of the inclusion of a few blockbuster films which weights the average on the long side. In 1974, ABC claims to have purchased 28 feature films which averaged 29 months between theater release and their broadcast period. The exclusion of a few blockbuster films would shorten this period. Therefore, the broadcast interests claim that the present two-year rule reflects actual market distribution practice and any relaxation of it would at least delay the broadcast use of feature films. The NAB asserts that the two-year rule actually aids pay interests because it encourages program producers to make films available for home pay exhibition before the two-year

period runs. Any relaxation of the rule would delay the conventional broadcast use of a film and would interfere with the public's ability to see the film when its appeal is still fresh.

36. It is claimed that any shrinkage of the eight-year period between a feature film's second and tenth year after theatrical release during which home pay use is now banned would encourage program producers to withhold at least the best films from conventional television use. Since network exhibition of a film diminishes its value for pay use, the broadcasters claim that the program producers will distribute their best films in the following manner: theatrical release—home pay release—rest—second run theatrical release—second run home pay release. . . . Thus the film would never reach conventional television. The fact that a very few blockbuster films like "The Godfather" do not reach home pay distribution during the present two-year period does not outweigh the benefit to the public of having such films offered via conventional television on the earliest possible date.

37. Independent broadcasters in particular oppose any relaxation of the present ten-year rule. Metromedia claims that older films constitute between 25 and 40 percent of the programming on three of its television stations. Statistics submitted by the NAB indicate that during a three-week period, 66 percent of all the films broadcast by Washington, D.C. and Baltimore television stations were ten years or older. The figure was 79 percent to 92 percent for the three independent stations in those markets. Kaiser Broadcasting states that it holds rights to 5,036 films of which 4,512 are more than ten years old. Metromedia has devised an economic model which indicates that a pay cable operation with only 5,500 subscribers would have the economic potential to outbid television broadcast stations like WTTG, Washington, D.C., which pays an average of $1200 for the films it shows.

38. The broadcast interests contend that the large number of feature films "available" for broadcast use is misleading. Metromedia claims that only about one half of the older films available are suitable for television broadcast use; and only about 23 percent could be called desirable. It is asserted that these few desirable older films would be siphoned by the pay operators should the present ten-year restriction be relaxed. Metromedia claims that talk of simultaneous use of older feature films by pay and conventional broadcast interests is unsound. It would be in the best interest of both the program producers and the pay operators to maximize revenues by withholding the best older films from conventional television for exclusive pay use.

39. Among the broadcast interests only ABC proposed a change in the present rule prohibiting subscription use of all series type programs. ABC proposed a rule which would permit subscription use of non-network series which have not been shown on conventional television for five years, and all original productions which are innovative and diverse.

40. A number of broadcast interests suggest that the existing rule requiring that no more than 90 percent of subscription cablecasting consist of feature films and sports combined be amended to a requirement permitting less use of films and sports events. This is alternatively suggested as necessary to restrict the amount of program siphoning that might take place or as necessary to encourage the development of a

more diversified type of programming offering. ABC, for example, would have us lower to no more than 60 percent sports and films combined.

41. With regard to the sports rule, there was unanimous support among the broadcast interests for amending the cable rule to comply with that now in effect for STV. They contend that the danger of sports siphoning is even more apparent with regard to pay cable than STV because of cable's multichannel capability.

42. Although the broadcast interests agree that the sports rule should be strengthened, there is a wide range of opinion as to the amendments which should be made. The MST comments proposed a ban on all sports carriage within one week of the occurrence of the event. ABC would retain the existing STV rule for specific events and have the Commission consider requests by pay interests to carry non-specific events on an *ad hoc* basis rather than attempt to refine the existing rule. Another proposal along this line would ban pay use of the four major sports except where a showing is made that pay carriage would not affect the sport's availability on conventional television.

43. The opinion of what should constitute a substantial number of non-specific sports events ranges from 10 percent, MST, to 25 percent, Metromedia and NAB. The remainder game proposal contained in the *Further Notice* is generally regarded by broadcast interests as unworkable. It is contended that sports events are not fungible because of differing spectator interests in teams and the differing times at which games are played. Thus the remainder game concept would result in all the most desirable games being placed on pay operations, leaving the least desirable games for conventional television broadcast. The right of first refusal concept is also rejected by the broadcasters because of the administrative difficulty in determining the reasonableness of an offer. CBS, however, advocates the right of first refusal concept when applied to new sports events. There is absolute agreement among broadcast interests that no new categories of sports events be recognized. Any further categorization, it is asserted, would increase the ability of pay interests to carry sports programming.

44. The broadcast interests generally deny that "warehousing" of feature films takes place. It is admitted that in a very few instances a network may contract for exclusivity during a portion of the two-year period after a film's theatrical release, but this only occurs when the film is scheduled for early network exhibition. Such exclusivity protection, it is argued, is necessary to protect the films' value to the network. ABC asserts that of all feature films to which it purchased rights between August 1, 1969, and July 31, 1974, only two were not telecast. It is charged that the proposal made by NCTA to ban all exclusivity arrangements would benefit only the pay interests, since the usual market distribution pattern makes feature films available to pay interests before conventional broadcast interests.

45. The broadcast interests supported the proposal that pay operations be required to notify the Commission prior to the commencement of their activities. Such notification would assist the Commission in assessing the development of pay cable television operations.

46. The proposal to suspend the subscription rules for four years which was submitted by NCTA and supported by many other cable

interests and program suppliers is fiercely opposed by the broadcasting interests. Metromedia characterizes the proposal as an "insidious trap." It is argued that, should the Commission suspend the rules, they would never again be given effect because entrenched pay interests would meet any attempt to reinstate the rules with arguments that to do so would disrupt established viewing habits of subscribers and would interfere with the economic expectations of the pay cable investors who will have invested billions of dollars on the basis of the status quo.

Broadcast subscription television

47. Four parties with interests in over-the-air subscription stations filed comments in this proceeding. Each of these comments is brief and suggests essentially that the program content regulations applicable to subscription cablecasting and to subscription broadcasting should be the same. The STV interests also support the proposed requirement that cable television systems provide notification to the Commission within thirty days of the commencement of subscription programming.

48. Pay Television Corporation states that the alternatives contained in the *Further Notice* involve complicated formulas which would inhibit the free flow of competition for product and contends that the present rules should remain unchanged. However, the comments provided by Mr. Robert S. Block suggest several alternatives to the existing rules.

49. Mr. Block favors a three-to-nine-year rule for feature films with a provision that a film would be available for subscription use after the three-year availability period if a contract had been signed for its network exhibition. Additionally, a film would continue to be available to pay interests after the three-year period if the film had been made available in good faith to conventional television and no contract had been signed for its telecast. Mr. Block believes that the three-year period should begin to run not from the date on which a film is initially shown in any theaters, as under the present rules, but only after the film has been generally released in the top 25 metropolitan areas in the country. As to films over nine years old. Mr. Block sees no public interest in restricting their subscription use.

50. With regard to sports, Mr. Block proposes a rule which would average the number of games telecast in a specific market over the previous five years prior to proposed STV or pay cable showing. The remainder of games in the "home" and "away" categories would then be made available for pay use. To resolve the concern of those who feel that such a rule would eliminate the possibilities of conventional television expansion, Mr. Block suggests that provision be made such that a ten percent increase in games be made available each year, over the five-year average, to conventional television, which would have the option to accept or reject the added number of games.

Cable Television

51. The views of the cable television industry in this proceeding were set forth in comments filed by the National Cable Television Association (NCTA), various state and regional cable television associations, and over 20 individual cable.television system owners and operators. In general, the position of the cable television industry is that the Commission has no jurisdiction to impose the pay cable rules and that

the rules violate the antitrust laws, the Copyright Act and the Communications Act insofar as the rules discourage competition.[18] Furthermore, it is asserted that the existing cable rules constitute an impermissible restraint on free speech in violation of the First Amendment. In the broadcast area, regulations which affect speech are justified solely on the ground that there is a technical limitation to the availability of frequency space. *National Broadcasting Company v. United States*, 319 U.S. 190 (1943), *Red Lion Broadcasting Company v. FCC*, 295 U.S. 367 (1969), *National Association of Theater Owners v. FCC*, 420 F. 2d 194 (D.C. Cir. 1969). In the subscription cable area, frequency space is not used so content regulations cannot be sustained. If the rules do not violate the First Amendment on their face, it is argued that because they certainly restrain speech there must be at least most compelling evidence that they are essential to preserve the objectives of the Communications Act. Available evidence indicates that no such showing can be made. Absent any hard evidence that the public would suffer, there should be no pay cable restrictions. The cable industry asserts that a record based on actual marketplace experience is required to justify restrictions on pay cable programming. Therefore the present rules must be at least suspended to allow the marketplace to determine whether restrictive rules are needed to protect the public.

52. It is argued by pay cable proponents that subscription operations are needed to make cable television viable, especially in urban markets where broadcast signals are available. Pay operations are regarded as necessary in many cases to provide the gross revenue base cable systems need to build and provide other non-broadcast services. Revenues obtained from subscription programming are essential if advanced cable systems in the larger markets are to be constructed and comply with the requirements of the rules. As with conventional television, cable television must provide entertainment programming like feature films and sports events to support less profitable news, special interest and public service programming. The present restrictions, it is argued, do not permit an adequate supply of entertainment programming to attract subscribers. This situation in turn adversely affects the willingness of investors of finance cable operations. The California Community Television Association points to a large demand for more "G" rated feature films on the subscription operation serving San Diego. However, the present program restrictions force the operator to carry a large number of "R" rated films which do not have family appeal. The TM Communications Company claims that it has reached only between 9 and 16 percent pay penetration on its systems because there is not enough film product to attract subscribers. Telecable Corporation asserts that after careful study, it has decided not to introduce subscription service on any of the systems it

[18] By way of underlining the importance of antitrust polices, NCTA quotes the following language from *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972): "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster. Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy."

operates because of the lack of sufficient product to attract subscribers. Because the program restrictions restrict the market to which programming may be sold, thereby reducing the return to the program creator, it is argued that the rules stifle creative effort; a loss shared by the general public.

53. Arguments that development of direct payment forms of television distribution will prejudice the poor are incorrect according to cable interests. Pay systems, rather than requiring payment for what is now available free will make available box office films, sports, educational, and cultural programming which is either not now available at all except to a very few, or which is available only upon payment of high box office prices and the parking, baby sitting and other expenses attendant thereto.

54. The NCTA asserts that it is impossible to offer irrefutable proof against the broadcasters' siphoning predictions because it is impossible to prove a negative, i.e. that siphoning will *not* occur. Therefore, the burden of proof should be placed on the broadcast interests.

55. Although the NCTA agrees that it is not in the public interest to allow programs now seen on conventional television to be removed from that medium, it claims that no factual basis presently exists to support any rules restricting pay cable exhibition of feature films and series type programs. There are presently only some 89,000 [17] pay cable subscribers. But even with one million subscribers, the NCTA claims that a maximum of $2,400,000 would be available for the purchase of 8 feature films nationwide in any given month. This works out to be $300,000 per film. In 1973, the average film sold to the networks for two runs brought $750,000 to $800,000 and an additional $250,000 to $350,000 was obtained from the independent stations in syndication. This evidence indicates that there is no danger of siphoning in the forseeable future. The NCTA claims that the broadcasters' predictions of the economic power of pay cable ignores the high capital and labor costs to the cable industry; the division of revenues among program supplier, channel lessee, and system operator; the multiplicity of operators purchasing different programs; and the impossibility that all subscribers would want to watch the same programs. But even if pay cable had the magnitude of economic resources in the future to buy up features, the motion picture suppliers would never permit exclusive use by pay interests. The exhibition of feature films on conventional television, regardless of prior showings in the theater and on pay cable, will continue to be a critical source of income for the motion picture companies.

56. On the issue of siphoning, Viacom International Inc., points to a Stanford Research Institute study which predicted that pay television viewers in 1985 will not spend more than seven percent of their viewing hours watching pay programming. This indicates that the effect of pay cable on conventional television will be slight, if there is any effect at all. In support of this view, the California Community Television Association states that only six tenths of one percent of California television households are pay cable subscribers. These figures show that the conventional television audience is not now, nor is it likely to be, threatened by pay cable. With its vast viewing audience

[17] Other estimates place this figure at 100,000.

intact, conventional television will continue to have the economic resources to provide the quality of programming which it now delivers. The extent of these economic resources is demonstrated by several recent network film purchases: $10 million for "The Godfather," $5 million for "Gone With The Wind," and $3 million for "The Poseidon Adventure."

57. The NCTA states that the broadcast interests speak much of delay with regard to feature films, but that is not the issue. It asserts that the basis for the Commission's pay television and pay cable rules has been the concern of depriving the public of programming it now receives free. For the first time in the *Further Notice*, the Commission raised the issue of delay. The Commission should not, it is said, establish regulatory precedent that it will regulate the timing of which programming is shown on broadcast television. The Commission does not restrict theatrical runs to force movies to reach conventional television earlier, and no more reason exists, it is argued, to restrict the length of time feature films are used by pay cable. In any case, the NCTA states that pay cable exhibition of feature films without restraint will not delay the exhibition of feature films on conventional television. The average time between first theatrical release and first telecast has remained at five years and two months for the seven television seasons since 1967–68. The imposition of the present two-year rule has not hastened the market process by which feature films reach conventional television.

58. Additionally, the cable interests join the program suppliers in stating that the present rules ignore the fact that any significant increase in demand for feature film and series product will result in an increase in the supply of such program product. The supply of programming is elastic. Production studios are in difficult economic straits and unemployment among actors and production personnel is chronically high. With increased outlets for its programming, the program software industry would gird itself for increased production to meet the demand. This increase in supply would aid not only the subscription cable industry, but also provide more programming and particularly more general audience programming for both theaters and broadcasters. Any argument that more programming cannot be produced is refuted by the recent increase in made-for-television movies.

59. The cable television interests are unanimous in their opinion that the existing rules which generally prohibit use of feature films more than two years after their first general theatrical release are overly restrictive and result in the better films never becoming available for pay cable use because they continue to be used in theaters for the whole two-year period. The NCTA states that the pay rules in effect "warehouse" feature films because of the restrictions placed on their use. It claims that since there is no rationale for the feature film and series rules, the NCTA is opposed to all of the alternatives listed in the *Further Notice* as well as to the existing rule. Most cable interests agree with the position of the NCTA, although a few specific alternative proposals were advanced.

60. TM Communications Company favors the first proposal set out in the *Further Notice* as the one freeing the most films for pay use. It

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suggests a five-year rule with the caveat that pay use of a film would be limited to a 24-month period from its first pay cable use.

61. Cablecom-General, Inc., favors the second proposal contained in the *Further Notice*. It suggests that a film should be made available for pay use for a period of time related to the length of its theatrical run. Then conventional television should be allowed the same amount of time to exhibit the film, after which there should be no restrictions on its use.

62. TelePrompTer Corporation agrees with the position of the NCTA that all feature film restrictions on pay use should be removed. Moreover, it suggests that the Commission should prohibit a film's use by conventional television until pay interests have had an adequate opportunity to exhibit it. TelePrompTer states that there should be a "window" for pay use—for instance a floating one year rule—during which pay interests would have exclusive use of a film between its theatrical run and its exhibition on conventional television. The NCTA rejects the "window" concept, whether or not it is for exclusive pay use. It states that such a rule unfairly affects subscribers of new systems built after the window has closed.

63. Cable television interests contend that the series and feature film rules are unnecessary and self-defeating because there exists considerable quantities of unsold program product that could be used by pay cable operations without withdrawing any product from broadcast use. Comments filed in Docket 18179 (concerning limitations of exclusive purchases of programming by broadcast stations) indicate that there is substantial program product available for broadcast use which remains unsold. Of the 54 separate series programs placed in syndication in the top 50 markets between 1965 and 1970, 5.1 percent of the markets remained unsold and of the 31 feature film packages placed in syndication, 32.1 percent of the markets were unsold. Of the many thousands of films over ten years old, subscription cable may only use 12 films a year under existing rules, although it is clear most of these films will not have broadcast exposure during that time.

64. The NCTA contends that there should be no limitation on the exhibition of feature films by pay cable after network exhibition. Once the film has been shown on network television or even contracted for, there can be no hypothetical concern about siphoning or delay. There is a large supply of feature films available for both broadcast and pay cable use. According to NCTA's study of the Detroit market, for example, the five television stations in that market televised 2,271 films during the 12-month period. Of the 18,000 films available in the market, 15,729 were not televised. Similar situations exist in the markets of Houston, Sacramento, Syracuse, San Antonio, Orlando/Daytona Beach, Cedar Rapids/Waterloo, Portland/Poland Springs, Sioux Falls/Mitchell, Amarillo and Washington. The anti-warehousing rule proposed by the NCTA (see paragraph 68, *infra*) would insure unrestricted simultaneous use of older films by pay interests and conventional television because the film producers will be anxious to exploit both markets. In response to the contention of Metromedia (see paragraph 38, *supra*,) that there are only a very limited number of suitable older films available for broadcast use, the NCTA asserts that in a recent 12-month period all of the Washington, D.C. television stations

purchased only 530 film titles. With something like 18,000 titles available, it is claimed that there is an abundance of quality film product available for both conventional television and pay use.

65. The NCTA and many other cable interests would have the Commission abandon its series rule altogether. The California Community Television Association states that at least pay cable should be allowed to carry series which have been rejected by conventional television. This proposal is somewhat in line with that of ABC (see paragraph 39, *supra*.). Viacom International, Inc., proposes that pay interests be allowed to develop their own series programs. It states that pay cable provides an opportunity to air series programs with less than mass audience appeal.

66. Cable interests submit that the sports rules are overly restrictive because there is a significant number of sports events which will not be broadcast and which the rules prohibit subscription television systems from using. The NCTA suggests that the existing two-year rule be retained but not expanded to five years as it has been for STV. For non-specific events, the network or local broadcaster should be granted a right of first refusal to the larger of the number of games in a given category telecast in either of the last two years. All games in a category above the two year high water mark, remainder games, could be licensed to pay cable without first giving broadcasters the right of first refusal. In this way all sports events could be made available to the public, either by broadcasters or pay interests. The NCTA points out that the Commission's recent Home Box Office letter [19] demonstrates that the use of remainder games by pay cable has no adverse impact on conventional television and results in the public having the opportunity to watch events not televised. Additionally, Cablecom-General states that there should be no restrictions on delayed pay cablecasting of sports events.

67. With regard to the question of whether the Commission's pay cable and STV rules should be the same, most of the cable interests which commented on this issue were of the opinion that because STV involves the use of the broadcast spectrum the STV rules should be considered separately from the cable television rules. However, it is urged that, if new cable rules are adopted, they apply equally to all forms of cable communication, whether it be subscription cable, multipoint distribution service, laser, closed circuit or any other technology which is developed. With regard to the broadcasters' proposal that the subscription cable rules be extended to programming for which no additional charge is made, the cable interests reply that they have been engaged for some time in such cablecasting and no evidence has been presented to suggest why the subscription rules should be extended to this type of programming.

68. Those cable interests which commented upon the warehousing issue assert that broadcast interests should be prohibited from withholding feature films from pay cable by way of exclusivity contracts. The NCTA claims that broadcasters now use exclusivity contracts to warehouse films before they are two years old and after they are ten years old. Thus, warehoused films may be withheld from pay cable

[19] Letter from the Commission to Home Box Office, Inc., September 17, 1974.

during much of the time now left open for cable by the Commission's Rules. To guard against such warehousing, the NCTA proposes the following rule:

> Networks shall not in the licensing of feature films restrict by contract or otherwise their exhibitions on pay cable except that a reasonable period of exclusivity can be contracted for, provided it does not commence more than thirty days preceding the first network broadcast under the initial network contract.

The NCTA also proposes the following rule to protect against warehousing by cable interests:

> Cable companies shall not in the licensing of feature films for pay cable restrict by contract or otherwise limit their broadcast over the air.

69. The California Community Television Association agrees that broadcast interests must be prohibited from purchasing unreasonable period of exclusivity, and additionally, proposes that the broadcast interests be required to make available to pay cable any film in which they have a financial interest.

70. TelePrompTer Corporation states that the NCTA proposal does not go far enough to protect pay cable from the "predatory practices" of the broadcast industry.[19] TelePrompTer asserts that the networks have purchased "The Godfather," "Fiddler on the Roof," "The Poseidon Adventure," "Love Story" and "Patton" in an effort to kill the infant pay cable industry,[20] and proposes a rule which would prohibit the exhibition of a film by conventional television until pay cable has had an adequate opportunity to exhibit it.

71. As to the proposed requirement that cable systems notify the Commission prior to instituting pay service which was incorporated into Docket 19554 by the *Further Notice*, most cable interests are of the opinion that such information could more easily be procured with minor revisions of the Commission's present Form 325. Aurovideo, Inc., expressed concern that if objections could be filed to the proposed notification and such objections would stay a cable system's right to provide pay service, the result would be tantamount to requiring Commission permission to provide pay service. Such a requirement has already been rejected by the Commission. *See* paragraphs 32–35, *Clarification of Rules and Notice of Proposed Rulemaking*, FCC 74–384, 46 FCC 2d 175 (1974). Viacom International Inc., specifically opposed the petition for rulemaking initially filed by the National Association of Theater Owners (RM–2371), stating that the proposed rule would place an unnecessary burden upon cable system operators and that the proposal was an attempt by the theater owners to use the Commission's process to obtain competitive information.

72. The general substance and tenor of the industries' comments are perhaps well summed up in the following statement from the comments of Columbia Cable Systems, Inc., *et al:*

> The immediate effects of Section 76.225 are threefold. First, the freedom of both buyers and sellers of programming covered by the rule to buy and sell such programming in the open market is unlawfully and unjustifiably restrained. *See Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). Second, the rule undermines existing policies favoring competition in the distribution and licensing of programming in the movie and sports industries. *See e.g., Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946); *United States v. Loew's, Inc.*, 371 U.S. 38 (1962). And third, and ultimately, by withholding from pay cablecasters the essential resource—programming—without which they cannot compete with broadcasters, the rule preserves, and strengthens, the existing monopoly position of many broadcasters and, particularly, of the networks. Each of these aspects of Section 76.225, whether taken individually or collectively, would, if they were the result of private as opposed to governmental conduct, constitute a violation of the antitrust laws. *See Silver v. New York Stock Exchange*, 373 U.S. 341 (1963). These restrictions on the ability of pay cablecasters to freely compete with broadcasters are directly in conflict with the procompetitive policy of the Communications Act and with Congressional policy favoring competition unless expressly excluded, and may only be imposed upon a compelling showing that they are required to effectuate, and will not obstruct, objectives of the Communications Act.
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> The restrictions imposed upon pay cablecasting by Section 76.225 rest upon the Commission's assumption that pay cablecasting, at some point in the future, may result in the siphoning of programs from "free" television, thereby depriving viewers of some programming which they might otherwise receive without charge. This assumption, to date, is totally unsupported by any documented evidence and is founded, essentially, upon speculation.

73. Because there is allegedly no evidence to support pay cable restrictions, at least as to feature films and series type programs, the cable interests led by the NCTA propose a four-year moratorium on such rules after which time the networks and broadcast interests should be required to justify any proposed restrictions on pay cable service. It is claimed that such a four-year period would allow the marketplace time to determine whether any restrictions on the pay use of feature films and series programs are necessary to protect the public interest. Cablecom-General, Inc., suggests that the Commission undertake its own study during the proposed moratorium period to assess the possible effects of pay cable programming on conventional television service.

Subscription cable television entrepreneurs

74. Comments were received from five subscription cable television entrepreneurs. The comments of this group generally reflect those submitted by the cable television interests, asserting that the Commission has no jurisdiction to impose the cable television program restrictions and, in any case, the restrictions with regard to feature films and series programs are not needed to protect the public interest, and the restrictions with regard to sports programs should be relaxed to permit pay cable carriage of events not televised.

75. In addition to the anti-trust and constitutional issues raised by the cable television interests (paragraph 72, *supra.*) and the Justice

[19] Referring to a December 20, 1973, letter of Mr. Everett Ehrlick of ABC to the then Chairman, Dean Burch, TelePrompTer states: "Thus, for example, 'Diamonds Are Forever' was contractually barred from pay cable during all but the first three months of the two year up-front period permitted by the Commission's rules even though ABC was not licensed to broadcast the film until three years after initial theatrical release. Of the 142 films covered by Mr. Ehrlick's letter, exactly half were barred from pay cable during at least part of the two-year period following initial theatrical release. The effect of such prohibitions was to reduce the period allowed to pay cable by 17.4 months—or almost 2/3rds of the time allotted to pay cable by the Commission's rules. Mr. Ehrlick's somewhat muted suggestion that exclusivity of this sort is necessary to ensure that films be properly 'rested' before network showing is obviously ludicrous when viewed in the context of a pay cable industry with 70,000 subscribers. Note, moreover, that the contracts entered into by ABC do not provide for exclusivity against in-flight exhibition, armed forces network exhibition, or closed-circuit hotel distribution, each of which has larger audiences than pay cable."

[20] TelePrompTer claims that the intent of the networks to harm the pay cable industry is indicated by the fact that NBC will actually lose money on its airing of "The Godfather."

Department (paragraph 124, *infra*), Home Box Office, Inc., *et al.*, asserts that the subscription rules are constitutionally defective in that they are vague and overbroad. *NAACP v. Button*, 371 U.S. 415 (1963), *United States v. Robel*, 309 U.S. 258 (1967). The overbreadth of the rules is demonstrated by the fact that they prohibit the pay cable exhibition of feature films and sports events even when there is no danger of siphoning, the evil against which the rules were designed to guard. HBO points out that the rules frustrate its desire to exhibit "Butch Cassidy and the Sundance Kid" even though ABC has contracted to show the film in 1976. Pay cable exhibition of the film could in no way affect its exhibition on conventional television. In the sports area, the rules operate to withhold from pay cable hundreds of events which conventional television has no desire to telecast. As to the issue of vagueness, HBO points to Section 76.225(a)(2) of the Rules which prohibits the subscription cablecast of sports events which "have been televised live on a nonsubscription, regular basis." The Commission has never provided concrete guidance as to how this rule will be applied in specific circumstances, thereby making compliance with the rule an impossibility.

76. The pay cable interests state that they provide a unique form of entertainment, even when the same product is available in theaters and on conventional television, and that this diverse entertainment opportunity should not be denied the public on the speculative ground that to do so might in the future affect conventional television. Optical Systems Corporation points out that "There are several distinct features of pay cable programming, particularly feature films, which fulfill the desires of many American families: the opportunity to see feature films in the privacy and security of one's own home *in their original form; uninterrupted by commercials;* at the *viewer's convenience;* and most significant, at a *cost* for the entire family that is less than a single child's admission ticket to a movie theater." With regard to the siphoning issue, Warner Communications, Inc., states that pay cable now reaches only about two tenths of one percent of the nation's television homes, and all pay cable operations have been operating at losses. Under these circumstances, Warner questions the ability of pay cable, now or in the foreseeable future, to outbid conventional television for programming.

77. The subscription cable entrepreneurs cite lack of sufficient film product as one of the most important restraints on their continued growth. Optical Systems Corporation states that 104 feature films are required each year by a pay cable operation. It says that from September, 1972, to August, 1973, only 370 feature films were released. Of these only 114 were acceptable for pay cable showing. the rest having "X" or "hard R" ratings, or being undubbed foreign films, etc. Of these 114 acceptable films, only 89 were made available to Optical by the film owners. Many of the 89 films, particularly the better ones, had theatrical runs lasting most of the two-year period which the rules allow for pay cable exhibition. But even if the two-year rule were relaxed to a three or four-year rule, Optical asserts that very little new product would be made available for pay use because most of the acceptable film product of the past two years has already been exhibited by subscription systems. Pay cable must have access to

the vast number of films over two years old in order to fill its program schedules. Optical attributes most of its subscriber disconnects to the lack of sufficient quantity and quality of feature films, particularly family oriented films.

78. Optical asserts that films over ten years old can neither be purchased from their producers nor distributed to subscribers at the rate of only 12 per year. It states that these older films can only be purchased in large packages and must be exhibited in film festival type blocks of 20 to 30 a week along with at least two current movies. Because of these marketplace realities and the restrictions placed on older films by the Rules, Optical states that it has never purchased or exhibited feature films over 10 years old.

79. Commenting on the series program rule, Home Box Office suggests that the rule should be changed so that it bars at the most only series which have been distributed by a national television network within the two years preceeding the date of the proposed cablecast. It claims that the present rule bans any type of innovative or special interest series program, as well as series which have been rejected by conventional television.

80. Because none of the four alternatives to the present feature film rule contained in the *Further Notice* would adequately meet their product needs, the pay cable interests consider the alternatives unacceptable. Instead, they favor the proposal of the NCTA and other cable interests that the feature film and series program rules be suspended for at least four years during which time the effects of unrestricted film use could be studied. Since the results of such action would not occur overnight, it is claimed that the Commission would have plenty of time to take remedial action should harmful effects develop.

81. Home Box Office, Inc., states that both alternatives to the present sports rule contained in the *Further Notice* would be more acceptable than the existing rule, and that the second alternative is better than the first because it would free more sports events for pay cable use. However, HBO claims that both alternatives still suffer from overbreadth because they would deny to pay cable some games which would not appear on conventional television. HBO supports a rule which would give a right of first refusal to conventional television only as to those games which have been previously telecast. Regardless of the number of games which had been telecast in the past in any given category, such a rule would allow pay cable to carry any games which conventional television elected not to carry during the forthcoming season. Thus the public would not have to wait one year or three years or five years for an opportunity to view games not seen on conventional television.

82. In response to several questions presented for discussion in the *Further Notice*, HBO states the following:

> The base period for the cable television sports rule should remain the same and not be increased to five years as it was in the STV rule.
>
> The "substantial number" of games necessary to invoke the sports rule's prohibition of pay cable carriage should be 75 percent.
>
> The Commission should recognize additional categories of events on an *ad hoc* basis. The categories presently recognized are sufficient in most situations.
>
> The sports rule should be applied no differently to a situation in which a team's telecasts fall into more than one category than if they fall into only one category.

No distinctions should be made between professional and amateur sports, major sports and minor sports, team sports and individual sports.

Additionally, HBO suggests that, if the sports rule is not significantly altered, the Commission should clarify the status of post-season or playoff games in the various sports.

83. On the warehousing issue, Optical Systems Corporation states that the following warehousing instances have been reported:

1. That early in 1974, CBS acquired 4 films from MGM under a contract that prohibited pay cable exhibition during at least portions of the 2-year available exhibition period. These films were "Slither," "Soylent Green," "They Only Kill Their Master," and "Pat Garrett and Billy the Kid." In fact, Optical was informed by the distributor of these films, soon after they were licensed by CBS, that they would no longer be available for pay cable exhibition;

2. That NBC acquired "Day of the Dolphin" by a pre-release contract that prohibited pay cable exhibition during the entire two year period, and through the broadcast period. In fact, "Day of the Dolphin" has never been made available to pay cable;

3. That "Cabaret" and "Papillion" were excluded from pay cable exhibition by arrangement between ABC and Allied Artists. Neither film was ever made available to Optical:

4. That the "French Connection", which was first released theatrically on October 7, 1971, was sold to CBS in October 1972 with an exclusivity clause that barred any pay cable exhibition subsequent to October 7, 1973. This, despite the fact that the license precluded the network from showing the film until October of 1975.

5. Exclusivity provisions can be implied where films that originally were made available to pay cable have been "yanked", *i.e.* removed from pay cable availability prior to the expiration of the two year period. This is the case with the following films: "Poseidon Adventure"; "Slither"; "Soylent Green"; "Charlotte's Web"; "Young Winston"; "1776"; "Valachi Papers"; "Shamus"; "Godspell"; "40 Carats"; "The Stone Killer"; "Oklahoma Crude"; "Lost Horizon"; "Dillinger"; "Crazy Joe"; "Summer Wishes Winter Dreams"; and "The Getaway";

6. Coincidently, no films produced or financed for theatrical release by ABC have been made available to pay cable. These films include such titles as: "Cabaret"; "Kotch"; "Charley"; "They Shoot Horses Don't They?"; "Straw Dogs"; "Take the Money and Run"; "Song of Norway"; "Junior Bonner"; and "The Torch."

7. Despite numerous requests, theatrical films produced by Cinema Center Films, a CBS subsidiary, were never made available to pay cable. These films include: "Little Big Man"; "Scrooge"; "The War Between Men and Women"; "The Boys in the Band"; "Prime Cut"; "A Man Called Horse"; "The Reivers"; and "Blue Water White Death."

To guard against such anticompetitive practices, Optical submits that the Commission should prohibit any arrangement, by contract or otherwise, whereby commercial broadcasters preclude the licensors of feature films the right to license those films for exhibition on non-broadcast media. Alternatively, the Commission could reach the same result by interpreting the "financial interest rule" (Section 73.658 (j)(ii)) to preclude the television networks from obtaining exclusivity rights against other, nonbroadcast media. Home Box Office states that broadcast exclusivity against pay cable should be limited to a maximum period of 30 days prior to the first presentation by the broadcast purchaser, plus the run of the contract, provided that the contract is not unnecessarily long.

84. In summary, the position of the subscription cable television entrepreneurs is reflected in the following statement of Home Box Office:

Pay cable needs access to feature films and sports at this stage of its development. Because the market for specialized programming is still being plumbed, and its shape and directions are still unknown, there is little specialized programming of suitable quality. . . . not only would the public be forbidden to experience a new dimension in entertainment, it would be absolutely denied the right to see those feature films which either will not appear on the networks or will appear at inconvenient times or several years hence and would be deprived permanently of the large warehouse of sporting events which do not reach conventional television. The public should not be asked to pay a penalty to protect broadcasting, particularly where that penalty is not necessary to achieve the objective.

Finally, putting aside all of these positive reasons why pay cable should not be limited to programming other than feature films and sports, the answer is that the Constitution, the Communication's Act and the anti-trust laws require that the question be posed in the converse—the beginning presumption must be that pay cable may carry any programming it wishes; and the question must be why should pay cable be limited, not why not. The proper legal point of departure is that pay cable is not to be restricted in any manner unless there is clear and convincing evidence of a direct, adverse affect upon the totality of television service.

Motion picture and television program production industries

85. Comments in this proceeding were received from MCA, Inc., and a group of motion picture industry entities which includes The Motion Picture Association of America, Inc., and various program suppliers and copyright owners. The basic position of these program suppliers is that the rules restricting the use of feature films and series programs by subscription cable television are contrary to the public interest, are based on erroneous assumptions of fact, violate the First Amendment, exceed the Commission's statutory authority and are contrary to the anti-trust laws. To the extent that these arguments were discussed by the cable television interests and the subscription entrepreneurs, they will not be repeated here. However, a number of points made by the program suppliers sheds additional light upon the issues in this proceeding.

86. The program suppliers assert that subscription cable television will not replace either the theatrical or the conventional television outlet for motion pictures, but will expand the total audience which will see feature films. At the same time, it will furnish an incentive for the production of high-quality programs and of programs for minority tastes. Rather than siphoning product from conventional television, the program suppliers argue that the introduction of the new cable television market will decrease the cost of film product to theaters and television and increase the supply of feature films.

87. The program suppliers state that the unrestricted showing of feature films by subscription cable television will not result in the

siphoning of these films from conventional television. This conclusion is based on (1) a comparison of the relative size and economic importance of the conventional television and pay cable markets and the dependence of producers on revenues from conventional television; (2) hard data concerning the average time period that elapses between the general theatrical release of a feature film and its first showing on network television; and (3) the emergence of a new form of motion picture—the made-for-TV movie—which has replaced the theatrical feature as the dominant movie shown on network television and which demonstrates the elasticity of supply of feature film product.

88. MCA claims that the potential sale of a feature film to pay cable at the present time would earn at most $27,000 for the producer. This estimate is based on a subscription to the film by 30% of the total pay cable homes and a $2 charge by the cable system split 50–50 with the producer. This contrasts with the estimated average price of a feature film sold to conventional television during 1973 of approximately $800,000 for network showing and $250,000 to $350,000 for showing by local stations in syndication. MCA argues that these figures conclusively disprove any assertion that pay cable will be able to outbid or siphon movies away from conventional television.

89. The program suppliers state that as a general rule, motion pictures made for theatrical exhibition will be licensed in sequence to (1) theaters, (2) subscription television, (3) networks, and (4) local stations. This distribution is consistent with the historical pattern of motion picture distribution. In the Joint Comments of the Program Suppliers, it is stated that "It is impossible to imagine any reason other than insanity which would cause a distributor to continue licensing the picture indefinitely for Family Choice Cable after the revenue from this market has dried up—and when a pot of gold can be gained from a network exhibition."

90. The program suppliers also assert that unrestricted feature film distribution will not result in delay to conventional television. Statistics are provided which indicate that the average (mean) number of months which elapsed between the theatrical general release of a film and its first showing on network television for the last seven years was 61.95 months—more than five years—and that during the 1973–74 season this figure has even increased to 62.26 months. The median age of theatrical features shown on commercial television during the same seven-year period was 51 months and that age has increased during the 1973–74 season to 54 months. During the 1972–73 season, the average age of blockbusters was 71.56 months and the median age was 60 months. During the 1973–74 season, the average age of blockbusters had declined slightly to 69.8 months while the median age had increased to 65 months. Looking at these figures from a different angle, the program suppliers state that during the 1973–74 season, 101 movies out of a total of 115 theatrical movies shown for the first time on commercial television—88 percent—were over two years old. The program suppliers regard as unpersuasive the statement of ABC (*see* paragraph 35, *supra*.) that contracts for 28 feature films entered into by it in 1974 show an average elapsed time between theatrical exhibition and permissible broadcast period of 29 months. The program suppliers

assert that the ABC data is apparently based only on availability dates and not telecast dates; and that the more reliable guide is the entire schedule for the 1973–74 season. During that season ABC telecast 42 features with an average elapsed period of 70.43 months from theatrical release.

91. Even if delay does result in some instances from unrestricted pay cable exhibition of feature films, the program suppliers claim that the potential audience for these films would not decrease. A correlation analysis demonstrated with regard to 1,027 features covered by national Nielson ratings that the time lapse between the first general theatrical release of each motion picture and its first showing on conventional television had no significant impact on its popularity with television viewers. Therefore, it is argued that delay would reduce neither the popularity of the feature with the viewing public nor the income generated for conventional television.

92. Finally, the program suppliers claim that any increase in demand for film product created by subscription markets will be met by an increase in the supply of such product because of the present unused capacity of the film production industry. The best proof of the elasticity of supply, they state, is the recent and accelerated trend toward made-for-television films. In 1970, such features constituted only about 20 percent of all movies telecast by the networks. Today, they constitute more than 60 percent. Furthermore, it is noted that because these features are specially made for network television, they cannot be withheld from the networks and are subject neither to siphoning nor delay.

93. The program suppliers urge the Commission to allow a free feature film program market to exist without regulation in order to permit the gathering of experience from which policy decisions by the Commission may be made and regulations, if warranted, be issued. Because of the present lack of experience with regard to pay cable television, the program suppliers do not favor adoption of any one of the four alternatives proposed in the *Further Notice*.

94. The first alternative, which would extend the present two-year rule to three, four or five years, is preferred by the program suppliers to the existing rule, but they claim that many desirable features would still not be made available to pay cable. Features such as "Sound of Music," "Romeo and Juliet," "2001," "Gone with the Wind," "Bonnie and Clyde," "Harold and Maude," the Disney features and many others are more than three, four or five years old. A five-year rule would not free many of these pictures for pay cable use. The suppliers assert that any time period geared to theatrical release is unworkable and arbitrary in that the date of theatrical release triggers a most advantageable time clock for determining the end of the film's theatrical life. Additionally, they state that any revision of the two-year rule makes no provision for "grandfathering" or for systems not in being. Assuming the adoption of a revised two to ten year rule effective January 1, 1975, the program suppliers ask what provision would be made for films more than two, three or four years old that have never been shown on pay cable? Further, what provision would be made for systems which come into being thereafter? Depending on the starting date, they would be barred completely from showing a sub-

stantial number of features, or have a choice of a number of features with fore-shortened availability periods. The problem is particularly acute, they say, in light of the fact that there are only a relative handful of pay cable subscribers today—some 90,000.

95. The second alternative, the provision of a window for pay cable's use of a film commencing on the date of its first pay cable exhibition, is criticised by the program suppliers as being overly rigid and not taking into consideration the various requirements of each specific feature and the need for varying the time periods for the showing of a particular feature by a particular cable system. Also, they state that the effect of such a rule would be to require the smaller operators to accommodate their choice of features and the timing of their exhibition to the selection and scheduling of dominant cable operators. Moreover, cable systems which may not even have been in existence at the time a feature was first exhibited for pay would never get a chance to play it.

96. In the view of the program suppliers, the basic shortcoming of the third, or "wild card," alternative is that the wild cards will necessarily be blockbusters and that the rule would deny pay cable access to other movies, some of which will be needed to appeal to more specialized audience tastes, which now would be barred by the current two-year rule. They argue additionally that there is no basis in fact or logic for determining the number of wild cards; that the alternative does not provide for systems not in being which would be precluded from showing wild cards previously exhibited on other systems; that there is no basis in fact or logic for determining the permissible limited period of use; that large cable systems would control the selection and timing of exhibition of wild cards; and that as a consequence of the foregoing, the Commission and the affected industries would necessarily be embroiled in frequent and protracted waiver requests.

97. The fourth alternative, which would expose a feature film to cyclical bidding by cable and television interests, is impractical in the opinion of the program suppliers because it is incompatible with the business economics of sequential motion picture distribution by which feature films move from the theaters to subscription exhibition to networks and finally to local stations.

98. Commenting on the proposal of ABC (see paragraph 34, *supra.*) which would allow a feature film to be shown on pay cable only after a license has been issued to a network for a showing within 25–30 months from theatrical release, the program suppliers claim that such a rule would greatly strengthen the monopsony position of the networks. Networks could bar a feature from pay cable entirely by failing to make a contract for its exhibition within two years.

99. The program suppliers also urge the Commission to abandon its restrictions on the pay cable exhibition of films over ten years old. They claim that under the restraints of the present rule, pay cable systems have not been able to experiment with the offering of a channel of classical or older films, or group of older films which cater to minority tastes. In answer to the assertion of Metromedia (see paragraph 37, *supra.*) that a relaxation of the ten year rule would permit pay cable to outbid local television stations for this older film product, the program suppliers state that the absence of an unregulated market for the

carrying of these features by cable systems has made any assumption of what a viewer would be willing to pay for such older features pure guesswork. Additionally, they claim that Metromedia's assertion (see paragraph 38, *supra.*) that only some 20 percent of the supply of older films are suitable for broadcast use serves to strengthen the argument that at least the large unused part of the supply of older films should be made available to pay cable and not be barred as it is under the present rules. The suppliers note that the comments of Metromedia listed as undesirable films on opera such as "Aida"; historical drama such as "Abraham Lincoln"; foreign productions such as Ingmar Bergman's "Virgin Spring"; the French classic "The Umbrellas of Cherbourg" and the Russian "Ballad of a Soldier"; ballet type films including Balanchine's "Midsummer Night's Dream" and the "Bolshoi Ballet '67"; films appealing to minorities such "Malcolm X"; and "The Adventures of Chico"; pictures of religious and human interest such as "Albert Schweitzer"; films appealing to juveniles such as "Penrod and Sam"; and many others which would be marketable by pay cable. The program suppliers contend that it is no answer to say that features which cannot be sold to television shall be available to pay cable only upon a convincing showing to the Commission that *bona fide* attempts have been made to sell the films on reasonable terms for conventional television broadcasting and that they have been refused. They submit that if the Commission should let itself be led along the path of waivers and exceptions, it would end up in a quagmire. Such a procedure would make the Commission the reluctant arbiter as to which pictures are suitable for television and which ones are not, as to the price at which they should be offered and as to whether the negotiations were conducted in good faith.

100. The program suppliers contend that there is no danger that series programming will be siphoned from conventional television should the present restrictions be removed. They claim that producers of such programs simply will not and, indeed, cannot transfer a series that has received favorable ratings on the network to the more limited subscription market. The potential network losses would be staggering compared to the potential reward from pay cable either now or in the foreseeable future. Further, all network series contracts give the purchaser an option for the next television seasons. These options will extend for a period of five years or more and will prevent the transfer of the series to other media. Similarly, the producer is completely dependent on syndication revenues when a successful series has completed its network run and is ready for re-runs on conventional television. The producers would not sacrifice the essential revenues returned by syndication sales for a speculative audience that might or might not materialize from the pay cable market. Moreover, the suppliers claim that it is highly questionable whether the public would be willing to pay to view re-runs of series previously seen on conventional television.

101. With regard to the Commission's suggestion in its *Further Notice* that the progression of films be plotted on charts through the distribution chain under various regulatory schemes, the program suppliers conclude that it would be impossible to plot any valid and meaningful data on such charts. Because of the many imponderables

and unpredictable reactions of the public to a particular feature, they claim that it is impossible to plot or forecast with any degree of accuracy the path which a motion picture will actually take in the course of its distribution.

102. Of the program suppliers, only MCA supplied comments on the warehousing issue. It states that its experience is that pay cable has not been excluded from the use of feature films by pre-emptive buying of the networks. A review of MCA's agreements licensing feature films to networks since 1970 shows that they do not grant exclusivity during the two-year period of availability. Nonetheless, MCA recommends as a prophylactic measure that the Commission adopt a rule which would simply provide that the networks and television broadcast licensees on the one hand, and cable systems on the other hand, may not enter into agreements for the licensing of feature films which restrict their showing on the other medium.

103. With regard to the major issues of this proceeding, the following quotation from the comments of MCA summarizes the position of the program producers:

> The Commission has recognized that the development of a viable cable television industry as a supplement to conventional broadcast service, offering a diversity of choice to the viewing public, is in the public interest. *Cable Television Report and Order*, 36 FCC 2d 143 (1972). It has also recognized that CATV program origination is in the public interest and should be encouraged. *First Report and Order*, 20 FCC 2d 201 (1969). However, the rules which it adopted have fettered the development of a Family Choice Cable service be restricting the sale and distribution of feature film and series programs where a per-program or per-channel charge is made. These restrictions were based on the premise that it is necessary to protect conventional television against "siphoning" of programs by Family Choice Cable.
>
> MCA submits that there is no factual or evidentiary basis which supports the present restrictions on the sale and distribution of feature films and series programs to Family Choice Cable. The evidence previously presented by MCA and other program suppliers and updated for the present proceeding conclusively demonstrates that the threat of "siphoning" is purely speculative, without rational foundation, and asserted solely as a protectionist device to insulate the broadcasting industry from free market competition. The ultimate issue is not "siphoning" but rather whether the public will be given a choice and whether there will be competition in the marketplace by another distribution medium for the attention and favor of the viewing audience.
>
> Further, the evidence fails to establish any basis for the assertion that feature films would be unreasonably delayed in their exhibition on conventional television if the present restrictions were removed. Indeed, if "delay" rather than "siphoning" were to become the asserted rationale for the rules, their anti-competitive bias would become even more obvious and their claimed public interest justification even less valid.
>
> Moreover, there can be no rationale which justifies the absolute ban on the showing of all series type programs by Family Choice Cable. Such an absolute ban can only frustrate the Commission's expressed and basic objective of augmenting the public's choice of programs through new types of services.
>
> For these reasons MCA urges the Commission immediately to repeal or suspend for at least four years the present restrictions on the showing of feature films and the absolute ban on series type programs by Family Choice Cable. At that time, based on the free play of market forces, the Commission would be in a position to examine and judge the evidence and to determine what restrictions, if any, are required in the public interest. Of course, the Commission could always act sooner if remedial action appeared warranted.
>
> Such a free and unrestricted period is the only method of obtaining sound answers to the myriad questions posed in the *Further Notice*. All of the alternatives suggested by the Commission are necessarily based on conjecture and speculation as to how the marketplace would or may develop. Untested by the crucible of experience, the imposition of restrictions can only serve to limit competition and to deny freedom of choice to the viewing public. (footnotes omitted.)

Sports Interests

104. During the initial phase of this proceeding, the only filing from a sports team owner, league, or related interest was filed by the National Hockey League. A number of other persons from the world of sports appeared at one or the other of the oral proceedings, including representatives of, or individuals connected with professional baseball, hockey, basketball, bowling, duckpin bowling, golf, and tennis. In response to the *Further Notice* written comments were received from the Commissioner of Baseball, the National Hockey League, the National Basketball Association, and California Sports, Inc. (operator of the Los Angeles Lakers franchise of the National Basketball Association, the Los Angeles Kings franchise of the National Hockey League and The Forum, a sports arena in Los Angeles).

105. In its initial filing in this proceeding, the National Hockey League's comments were largely directed toward changes in various specific aspects of the existing rules. Included were the following suggestions:

(a) Explicit authorization for the subscription showing of those games in a category of events, as for example away games, beyond those broadcast on conventional television.

(b) If the broadcast of a substantial number of games in a category precludes use of the remaining games on a subscription basis, then the definition of substantial should be high, e.g., 50% of the events in the category.

(c) In addition to the home and away game categories discussed when the existing rules were adopted, the inclusion of further categories such as weekday and weekend games, East Coast and West Coast Hockey games.

(d) Events shown live and those shown on a delayed basis should be treated differently.

(e) New events should be available for subscription use. More particularly, events resulting from the establishment of new sports franchisees should not be unavailable for subscription use for a five year period.

106. Although pressing these specific changes in the details of the existing rules, the NHL in a more philosophical vein appears to suggest that the reasons for the existing pattern of sports broadcasts, including the need to preserve gate receipts, the need for broadcast exposure to develop team loyalty, and the inability to clear broadcast time on local stations, would continue to exist and dictate broadcast patterns even if the Commission had no subscription television rules.

107. In its comments in response to the *Further Notice*, the NHL responded specifically to the questions raised in Paragraph 24, as follows:

(a) If the Commission is to retain the substantial number concept, substantial should be defined at a figure no less than 50%. The rationale for retaining the concept at all, however, is questioned. The NHL questions the wisdom, for example, in a market with no independent station of protecting all away games; in a market where a team must purchase television time to get on the

air at all, of protecting all away games for conventional broadcast. And in a situation in which 90% of the games are broadcast, not allowing the pay use of the remaining 10%.

(b) The use of the existing as well as additional categories of events is supported. As evidence that the use of home and away game division comports with existing broadcast practices, the following review of hockey broadcasts scheduled during the 1973–1974 regular season is presented:

	Home	Percent	Away	Percent
Atlanta	0	0	20	51
Boston	39	100	31	80
Buffalo	4	10	22	56
California	0	0	0	0
Chicago	0	0	39	100
Detroit	0	0	28	72
Los Angeles	0	0	15	38
Minnesota	3	7	27	69
New York Islanders	0	0	16	38
New York Rangers	0	0	29	74
Philadelphia	0	0	32	82
Pittsburgh	0	0	13	33
St. Louis	0	0	30	77

NOTE.—Similar patterns, it is urged, can be found in other categories. For example, because of line charges and time differences, it is said, that Eastern Time Zone teams do not televise West Coast games. A similar pattern is also said to exist in the telecasting of weekday and weekend hockey games—half of the games and half of the telecasts taking place on either Saturday or Sunday.

(c) With respect to the extension of those changes in the rules adopted for STV stations in Docket 18893 to subscription cable, the NHL suggests that there is no need for the extension of the anti-siphoning period to five years, that games broadcast as the result of Public Law 93–107 should not trigger the anti-siphoning period, that the protected period should not apply to new events, or be triggered by the broadcast of a tape delayed event unless it is obvious that the tape delay is merely a ruse to avoid the impact of these rules.

108. With respect to the specific proposals for regulating the carriage of sports events set forth in the *Further Notice*, the NHL objects to the right of first refusal concept as embroiling the Commission in disputes as to the reasonableness of offers, and to the idea of only permitting pay use of a fraction of the "remainder" games as an unnecessary attempt to protect from siphoning games which will not in any case be broadcast.

109. The National Basketball Association and California Sports, Inc. comments include many of the same points made by the NHL. California Sports notes particularly that in any delineation of categories, the Commission should not assume that broadcast patterns for all sports will be the same but should realize that each is *sui generis*. It is also particularly concerned that the rules not in any way prohibit the use of remainder games on a pay basis, stating:

> Protecting "remainder" games for "free" television constitutes the grossest form of bootstrapping by conventional television broadcasters. They start by demanding "anti-siphoning" rules to protect their existing monopoly; then they claim some preemptive right to similar "remainder" games even though not previously telecast by them, thus extending their monopolistic grip to new products as well.

110. The NBA comments suggest that the "substantial" number definition be a number no less than 33⅓% of the events in a category, that all remainder games should be available for pay use, and that in any event, games offered for broadcast at a fair price and not accepted should be available for pay use.

111. The Comments of the Commissioner of Baseball focus principally on two points. The first being that rules relating to the carriage of sports on a pay basis by cable television systems need to be related to rules under consideration relating to the importation of sports on distant signal channels carried by cable television systems.[21] Distant signal sports carriage, it is said, will both disrupt pay use of sports and may at the same time so undermine the financial strength of sports teams as to drive them towards pay distribution of sports events.

112. The second major point is that any new rules should be experimental and tentative because there simply does not now exist "enough reliable market data to make sensible prediction and decision on how the development of pay cable will affect broadcast viewing patterns; sports gate receipts; the value of over-the-air broadcast packages, advertiser response; and, finally the financial health of broadcasters, professional team sports, and the cable industry." During this experimental period, it is suggested that the following rules be in force:

§ 76.225(a)(2)

A. *Specific Events*

A specific event shall not be available for cablecasting in a community where the event has been televised live on a nonsubscription basis for the preceding two (2) years.

B. *Nonspecific Events*

The number of nonspecific events of a team which shall be available for pay cablecasting in a community shall be the average number of games of that team not televised live on a nonsubscription basis in the community during the two (2) years preceding their proposed cablecast; provided that, not withstanding the number of games telecast in the prior two years, any sports team may make available ? number of its games for cablecasting.

113. This rule would maintain the existing situation with respect to specific events and, with respect to non-specific events, would generally permit pay use of that number of nonspecific games not shown on free, over-the-air television in the two preceding years. That is, sports teams could sell for pay use those games not sold for over-the-air broadcast. The Commissioner of Baseball terms these games the "overage." In order to avoid penalizing those teams that have in the past made the maximum number of their games available to over-the-air television and to permit these teams to participate in the experiment, an exception to the general rule would permit pay use of a specified, limited number of games of these teams no matter what the prior broadcast pattern. Baseball notes that in the past, something over 40% of all major league professional baseball games have not been broadcast and that there is no reason why pay use of these games

[21] *Notice of Proposed Rule Making in Docket 19417*, FCC 72–109, 36 FCC 2d 641 (1972).

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should not be permitted.[22] Anticipating the argument that the rule proposed could allow pay use of the best games leaving the less attractive games for conventional broadcast, baseball urges that the problem is largely a theoretical one but one which the Commission should monitor for during the course of the experimental period.

114. To the extent the Commission rejects this approach and maintains its model, it is suggested that the definition of "substantial" should be a percentage approaching or greater than 50 percent, that the relevant categories should be increased to include day/night and weekday/weekend games, and that the existing two year period should not be extended to a five year period for nonspecific events.

115. During the initial oral argument in this proceeding, a number of additional points were made by sports interests which should be briefly mentioned. The Professional Bowlers Association made the point that it has been attempting to obtain regular network television coverage but has had only limited success. Those tournaments televised have been the high prize money tournaments during the first quarter of the year. Bowlers would like to have exposure during the rest of the year as well, so that if networks do not purchase tournaments during the rest of the year then these events should be available for use by pay systems.

116. A number of sports interests including particularly basketball, note the precarious financial position of some of their franchisees and urge that, insofar as time is unavailable on local stations to broadcast all their games and because pay use of some games could prevent the financial failure of the teams, all games not broadcast should be available for pay use. Likewise hockey, as a relatively new sport, finds itself in a financial bind, needing whatever additional revenues it can obtain. Fears that games will be withdrawn from broadcast use are discounted both because experiments with pay distribution of hockey games show speculation as to the financial attractiveness of

[22] The pattern of planned telecasts of baseball games during the 1973 season was as follows:

	Number of games telecast	Home games telecast	Away games telecast
Atlanta Braves	48	0	[illegible]
Baltimore Orioles	52	8	4[illegible]
Boston Red Sox	65	17	4[illegible]
California Angels	30	0	[illegible]
Chicago Cubs	148	81	
Chicago White Sox	129	81	
Cincinnati Reds	35	5	3[illegible]
Cleveland Indians	32	0	32
Detroit Tigers	40	12	28
Houston Astros	20	0	20
Kansas City Royals	28	0	28
Los Angeles Dodgers	22	0	22
Milwaukee Brewers	30	10	20
Minnesota Twins	30	0	30
New York Mets	112	58	54
New York Yankees	69	37	32
Oakland Athletics	22	0	22
Philadelphia Phillies	70	24	46
Pittsburgh Pirates	38	0	38
St. Louis Cardinals	29	0	29
San Diego Padres	0	0	0
San Francisco Giants	22	0	22
Texas Rangers	22	0	22
Total	1,093	321	772

this outlet to be greatly exaggerated and because it is essential to the success of a professional team that it obtain the maximum public exposure in order to generate fan interest.

117. The Duckpin Bowlers state that in spite of attempts to obtain broadcast coverage, they have had no success even as part of a sports anthology program. The Duckpin Bowlers concern, accordingly, is not with the rules prohibiting pay use of events regularly televised in the past but with the possibility that, as a new event, Commission approval might have to be obtained before pay use would be authorized.[23] It is suggested that whatever burden they would have to meet be clearly spelled out or, better yet, that the rules be limited to the four major sports covered in the recent anti-blackout legislation (Public Law 93-107).

118. The spokesman for the PGA Tournament Players Division and the Women's Tennis Association make the point that there is now a need for new markets for owners of television rights to sports events. Ten years ago, it is said, it was possible to find the "network window" for many sports events. Today this is seldom the case. The major sports, by expanding their schedules and otherwise restructuring, have blanketed the networks. Stations do not now want more sports events. Thus, the rules should be so structured that the minor sports which obtain only occasional broadcast exposure are not denied a market for their programming.

Theater Owners and Operators

119. The interests of the theater owners and operators in this proceeding were represented by the National Association of Theatre Owners, Inc., (NATO)[24]. NATO asserts that motion picture theaters provide public service contributions that are unique in a community and cannot be replaced by any electronic service. They provide a place for the people in a community (including underpriviledged and handicapped children, convalescing war veterans, and the elderly) to be entertained and diverted away from their homes and institutions. Theaters are said to be the magnet that attracts people into the downtown areas of cities in the evening hours and the presence of theater patrons in these areas attracts other people who are not attending a theater. Thus, the vitality of a city is kept alive by the theaters and the other businesses such as restaurants, which thrive on theater patrons.

120. Theater owners are opposed to the development of cable television systems distributing feature films because these systems, in competition with theaters for patrons, pose an economic threat to continued profitable theater operations. If theaters fail, the community will lose the unique benefits of having theaters and the failure of theaters would lead to continued inner city decline. According to NATO's analysis of the situation, if cable systems are authorized to exhibit on pay television channels the same movies upon which theaters must rely to sustain their operations, the motion picture theater industry would be seri-

[23] Section 73.643(b)(2) of the Rules applicable to programming carried on over-the-air STV stations, states in pertinent part: "Determination as to whether new sports events that are not the result of the restructuring of existing sports may be shown on a subscription basis will be made by the Commission as such new events occur."

[24] NATO consists of 42 state and regional theater organizations and motion picture theaters and represents more than 8,000 theaters and theater circuits, according to its comments.

ously, if not fatally, undermined. It is said that there are far from enough quality motion pictures now available, and if those pictures and the revenues they generate had to be shared with cable systems, the theaters' already marginal profits would evaporate entirely and the flow of revitalizing new capital into the industry would quickly terminate. Simple competition would not be fair. Cable systems, it is said, will be able to present motion pictures to the public at a lower cost than that which could be sustained by the motion picture theater industry. Some systems are offering feature films at 20 cents per person per film,[25] a price that cannot be met by the motion picture theater industry under the present structure. This allegedly unfair situation is said to result from cable systems amortizing their construction costs as part of the regular monthly subscription fee for basic CATV service and including no percentage in their pay TV charge to cover the cost of construction. Because theaters cannot do this, they are said to suffer from an unfair competitive disadvantage. Additionally, the theater owners charge that the Commission's distant signal carriage rules and franchise fee limitations amount to financial subsidization and economic protectionism which exacerbates the unfair competitive advantage which cable television has over the theaters.

121. NATO states that pay TV revenues are not essential to the viability of cable and it, therefore, urges the Commission to adopt a regulation which would prohibit cable systems from showing on a pay TV channel any motion picture that had been released for theatrical exhibition. As an alternative, and assuming the Commission is determined to authorize some form of cable pay TV motion picture exhibition, NATO suggests the adoption of a rule which would prohibit the pay cable showing of any feature film until one year after the date of the film's first theater exhibition or 90 days after the date, within that one year period, when such film was last exhibited in the community in which the cable system operates.

122. This alternative position is justified, NATO asserts, because the theater industry lives off about ten pictures a year, the rest being essentially fill-in. More pictures are needed. Pay cable operations also need film product, but the theatrical promotion of the films is essential to successful pay cable use. The proposed rule, intended to rationalize the distribution process and protect theatrical access to feature films, would essentially codify the existing distribution system, preserving the maximum number of outlets for each film, and permit the distribution of films first to theaters, second to pay cable, and third to broadcast television.

123. NATO claims that the Commission's present rules could upset the established feature film distribution pattern by forcing movie suppliers to forego completion of normal theatrical distribution in order to meet the Commission's deadline for sale of a film to pay television within two years after its first theatrical release. Therefore, NATO urges the Commission not to adopt any deadline for introduction of films to pay television. Without such a deadline, distributors

[25] NATO uses cable pay TV operation in San Diego as an example. This, it is said, involves the offering of current movies for as little as $1.50 for the whole family, for the whole week. According to NATO, no San Diego theater would be able to long withstand this kind of competition.

could preserve all their potential markets and would not be forced to choose distribution to one at the expense of another. Of the alternatives set forth in the *Further Notice*, NATO looks most favorably upon the second one which would permit pay use of a feature film in a particular market for a specified period after its first pay exhibition in the market. This alternative, NATO argues, would best prevent the siphoning of feature films from theaters through the distribution of such films to pay television at an earlier time than would otherwise be the case.

124. In its comments in this proceeding, the Department of Justice questions the authority of the Commission to adopt rules designed to protect theater owners. It says that "Many forms of non-broadcast entertainment and communications compete to some extent with broadcasting. Congress, however, has not conferred upon the Commission either the jurisdiction or the authority to balance these non-broadcast related interests in regulating the broadcast and related industries." To this argument, NATO replies that the Justice Department has urged and the Commission has adopted rules in other proceedings where it was determined that such action would benefit the general public. Specifically cited is the Commission's adoption of equal employment opportunity rules which were supported by Justice because of the contribution they would make ". . . toward reducing and ending discrimination in other industries." 16 RR 2d 1561, 1563. Similarly, it is stated that failure to adopt appropriate subscription cablecasting rules would have a serious and adverse impact on the future quality of urban life in the United States and that this provides ample justification for adoption of the rule suggested.

Miscellaneous individuals and groups

125. The Department of Justice in its comments urges that the restrictions on pay cablecasting cannot be supported at this point in time as necessary to preserve even a minimum amount of over-the-air broadcasting necessary to satisfy the public interest, that the origination of pay cablecasting programs by local program sources does not, on its face, threaten any valid Commission policy, and that, in view of the nascent status of the pay cablecasting industry, no empirical evidence exists which would indicate that allowing pay cablecasters to provide popular programming will have any serious adverse effects on over-the-air broadcasting. According to the Department, if pay cablecasting is allowed to provide attractive programs and subsequent experience indicates that the public interest is threatened as a result thereof, there will be time enough for the Commission and/or Congress to act on the basis of accumulated experience. Such a course of action which allows a new industry the opportunity to compete with established interests would, it is said, seem much more consistent with the competitive policies embodied in the Communications Act and this nation's general competitive policy than adoption of a policy which cripples a new industry in its attempt to offer new services because of speculative fears as to possible effects upon established firms.

126. The Justice Department states that the Commission's restrictive policy with regard to pay programming frustrates its goal of

achieving program diversity and acts as a significant deterrent to investment in pay cable. The Department points out that the Commission has repeatedly recognized the value of promoting competition in communications services in other areas subject to its jurisdiction and urges the Commission to take the same pro-competitive position with respect to subscription cable television. *See e.g.: In the Matter of Allocation of Microwave Frequencies Above 890 Mcs*, Docket No. 11866, 27 FCC 359 (1959), 29 FCC 825 (1960); *Computer Services Inquiry*, Docket No. 16979, 28 FCC 2d 291 (1970); *Specialized Common Carrier Decision*, Docket No. 18920, 29 FCC 2d 870 (1971); *Domestic Satellite Decision*, Docket No. 16495, 35 FCC 2d 844 (1972); and *In the Matter of An Inquiry Relative to the Future Use of the Frequency Band 806–960 MHz*, Docket No. 18262, 46 FCC 2d 752 (1974). The department asserts that the Commission's present restrictive policy is protectionist in outlook and fails to recognize the public benefits to be derived from free competition between pay cable and conventional television.

127. At the oral phase of this proceeding, it was urged that the Commission interfere with the free operations of the market place only with the greatest reluctance and it was suggested that we look at other areas such as energy or transportation policy to see examples of the disasterous effects of government interference with the incentives of the market place.

128. The Department notes that there are technical and legal considerations that require the Commission to approach pay cablecasting not merely as a variant of pay television but as an entirely separate communications problem, particularly because no spectrum space is used in the operation of pay cable systems. It suggests that the Commission's jurisdiction to regulate non-broadcast cable program services conducted by channel lessees is highly questionable. Finding no evidence that the provision of popular programs by local pay cablecasting systems or lessees would, either on its face or on the basis of experience, threaten a valid Commission policy, it is questioned whether the Supreme Court decisions in *United States v. Southwestern Cable Co.* 392 U.S. 157 (1968) and *United States v. Midwest Video Corporation*, 406 U.S. 649 (1972) support the Commission's attempt to adopt the rules proposed in this proceeding.

129. The fear of program siphoning, the Department asserts, ignores the fact that program material is not fixed in amount. It sees no evidence that the creative and financial capabilities of the program production industry will not be able to meet almost any predictable demand which pay cable and conventional television together might engender. In any case, siphoning will not take place overnight, but over a long period of time. The Department suggests that a five-year suspension of the program rules would place the Commission in a position to obtain hard, empirical information upon which it could base any future actions with respect to pay cable that might be shown to be necessary or desirable. The Department claims that the Commission has placed upon the proponents of pay cable the burden of proving a negative—that its development will not harm the public interest—rather than following the policy set out in *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940), which imposed strict burdens

of showing public harm upon parties seeking to block new competition in broadcasting.

130. The Department's comments conclude that if leased channel operations are to succeed, there is no practical open alternative to raising the necessary revenues through per-program or per-channel charges; that the combined effect of restricting cablecasting advertising and prohibiting the carriage of most types of conventional popular programs on a per-program or per-channel charge basis will be to eliminate the economic base and the financial incentives for independent commercial leased channel operations; and that an alternative policy which allowed cable system operators and channel lessees to engage in unrestricted pay cablecasting would appear to better promote both the goals of diversity of programming and local source origination. It suggests that the Commission consider, as a minimum, a phased schedule under which pay cablecasters would be relieved of the present restrictions.

131. Comments were filed by representatives of several cities, among them San Diego and New York. These comments generally favor the relaxation or total elimination of the Commission's pay cable program restrictions until a clear need for such restrictions has been demonstrated. It is stated that subscription cable television has the potential to bring new and diverse programming to city residents and should not be impeded on the basis of unproven fears that pay cable may some time in the future adversely affect conventional television. It is urged that the Commission allow pay cable television to compete freely in the marketplace, thereby encouraging and preserving consumer choice in the broad area of entertainment.

132. Several representatives of the financial community filed comments in this proceeding. Their comments reflect the view that in order to expand, the cable television industry must improve its profitability. Cable television stocks have declined far more than the general market and the equity market is virtually closed to most cable television companies. Similarly, debt financing is all but impossible to obtain in most cases. Additional revenues from rate increases will not provide enough capital for new investment. This means that added revenues and profits must be derived from the sale of new services. In addition, these services may add sufficient income in new urban systems where saturations may be relatively low to make them economically viable. At this time, the financial interests assert, pay cablecasting seems like the most feasible of the services that are possible. Therefore, they advocate a relaxation in the Commission's pay cable program rules in order to make more and better product available to subscription cable which would, in turn, improve the chances of profitability for cable television. In support of its request for a relaxation of the subscription rules, Paul Kagan Associates, Inc., an investment advisory firm, states that it projects only about 2,250,000 pay cable subscribers by 1980, generating revenues of $90 million for the purchase of programming. Such an amount was equal to six percent of commercial television's program budget in 1973. Kagan concludes that there is no danger of program siphoning from conventional television to pay cable in the foreseeable future and that the Commission's program restrictions are not warranted.

133. The Office of Telecommunications Policy (OTP) is of the view that the development of new programming and other information services that can be offered over cable should not be impeded by government-established barriers to the consumers' opportunity to purchase those services. In its comments, OTP states that the national interest, in fostering competition and in avoiding governmental restrictions on the free flow of entertainment and information, requires that the imposition of restrictions be based on evidence that the threatened injuries complained of are substantially probable in the absence of such restrictions. It asserts that the burden of proving injury to the public in the absence of programming restrictions should be on the proponents of such restrictions, and that they have not met that burden.

134. OTP concludes that pay cable television presents no credible threat to the public's continued reception of broadcast entertainment programming and recommends an experimental suspension of the Commission's pay cable program restrictions, with the exception of the sports rule.

135. Numerous comments were filed by representatives of minority groups and cultural organizations. The general tenor of these comments is that the subscription cable television program rules should be relaxed in order to further the development of cable television which will lead to increased minority access to and participation in the cable television medium and more diverse programming catering to minority tastes and interests. In its comments, the Metropolitan Opera claims that pay cable must be given access to mass entertainment programs such as sports and feature films in order to attract the wide audience base which is necessary to support programming of less than mass audience appeal. The National Black Media Coalition urges the Commission to remove all program restrictions from pay cable because pay cable will make black and minority oriented programming economically viable; will increase the outlets for product created by black talent and stimulate minority employment in the television industry; will provide black people with inexpensive access to movies, cultural and sports events; will open up new opportunities for black ownership and control of communications mediums; will help make the cable industry viable enough to support the kinds of access programming consistently advocated before the Commission by black groups; and will stimulate healthy competition within the communications industry.

136. The minority interests assert that conventional television is not responsive to minority tastes because conventional television serves advertisers who demand programs with mass audience appeal. They state that specialized and minority taste programming is more likely to be presented on pay cable than conventional television because pay programming will be based directly upon the intensity of consumer desire for particular programs. By purchasing programming directly, pay cable subscribers will be able to attract programs tailored to individual interests. Additionally, pay cable will stimulate the production of programs which will be available to both conventional television and pay cable and lower the cost of programs to each medium because of the additional revenue available for its purchase.

137. It is claimed that the development of pay cable will promote diversity of ownership in communications properties because cable

television lacks the barriers of limited spectrum space and of high capital outlay which have prohibited minority entrepreneurial activity in other communications industries. Once the basic cable system has been constructed, the cost to the minority enterpreneur of leasing channel space on which to carry subscription operations is relatively low.

138. Finally, it is asserted that pay cable can both increase the productivity of the performing arts and open access to cultural entertainment to many middle and lower income families. Pay cable will afford the producers of cultural entertainment an expanded audience and new sources of revenue in the form of subscription or per program charges. The viewing public will benefit by having an opportunity to enjoy cultural entertainment at lower prices than live performances.

139. Instead of its present program restrictions, the National Citizens Committee for Broadcasting urges the Commission to adopt the following forms of public interest regulation:

1. A requirement that pay cable operators present a minimum of 25% cultural and educational programming.
2. Franchising guidelines that give weight to such factors as minority participation in ownership.
3. Clarification that FCC EEO affirmative action guidelines apply specifically to pay cable operations.
4. FCC adoption of reasonable ranges for pay TV subscription and program charges, or requirement for local hearings on initial charges and any subsequent increases.

Such a regulatory scheme, it is argued, would promote diversity in program content, diversity in ownership, equal employment opportunities, and inexpensive access to movies, sports and cultural events.

140. The comments of the American Civil Union likewise argue against the imposition of pay cable program content restrictions. Describing itself as an enthusiastic supporter of the advent of subscription television, the ACLU expresses its opposition to all anti-siphoning restrictions as unwarranted intrusion of government regulation on program content, constituting a form of censorship. It urges that free competition will allow enterprising programmers to search out new audiences, including minority audiences, and provide a new avenue for the development of program diversity. Its comments also urge the right of open access by all originators of program and content services to the pay electronic carrier systems.

141. Two manufacturers of cable television equipment filed comments in this proceeding. The comments of General Instruments Corporation and The Magnavox Company reflect the view that a substantial relaxation or elimination of the Commission's subscription rules is necessary for the development of profitable subscription operations and such profits are necessary for the viability of the cable television industry. The manufacturers state that the successful implementation of pay cable services is absolutely essential to maintain the viability of the growth and development of modern urban cable television operations and equally essential to serve as a spur to greater research and development to improve existing technology and create new technology that will make the broadband communications network of cable a reality in the next decade. They contend that the development of subscription television will preserve the competitive technological position of the United States, enhance the growth of new

social services and provide new employment in the economy. Should the Commission not suspend its subscription rules entirely, General Instruments favors the Commission's first feature film alternative—a five-year rule with no restrictions on films over ten years old. As to sports, it suggests that all events not carried by conventional television be made available for subscription use.

142. Various members of the staff of the Cable Television Information Center of The Urban Institute and associates of the Rand Corporation filed comments on their own behalf. Their comments do not necessarily reflect the views of the respective organizations. While agreeing that it is appropriate for the Commission to promulgate rules designed to prevent program siphoning, these parties assert that the Commission's present rules go beyond preventing siphoning and are not justified. It is stated that the present rules provide exclusive or severely restricted markets for product to television broadcast licensees. Allocation of these broad markets by the Commission is unsound policy, and represents an excessively protectionist type of conduct in which regulators have often engaged in the past and of which they should be more wary. They argue that it would be far more appropriate for the Commission to adopt a rule which focuses with precision on siphoning of programs rather than on allocating broad categories of programming to the exclusive domain of broadcast television. A rule is suggested which would:

> require that two years after a theatrical feature film has been shown anywhere in the U.S. on pay cable, it must be sold for a prime time showing on conventional television either on a network or on a local station in the community located in a major market, if it is to continue to be shown on pay cable in that community; provided that each cable system has a certain number of "wildcard" exemptions that could be shown for pay each year, irrespective of whether sold to conventional television, and provided further that neither a pay cable entrepreneur nor a conventional television licensee can obtain or enforce an exclusivity contract against the other service;
>
> permit cable casting of events in a sports category in an amount that maintains for conventional television the highest number of games shown on conventional television in the community in any one of the last five years;
>
> eliminate the ban of series programming on pay cable;
>
> eliminate the ninety percent restriction on feature film and sports programming.

143. The foregoing review of comments summarizes the various positions and arguments which were presented to the Commission as part of this proceeding. Because of the vast number of comments submitted, only a few of the more comprehensive comments have been given specific mention. However, we believe that the views of each party to this proceeding are fairly represented in our summarization.

DISCUSSION AND RESOLUTION OF PROCEEDING

Purpose

144. The fundamental issue that we have considered throughout the Commission's many deliberations concerning subscription television

"is whether subscription television would provide a beneficial supplement to the program choices now available to the public and an increase of financial resources which would facilitate significant increases in the numbers of services available to the public under the present system; or whether it would seriously impair the capacity of the present system to continue to provide advertiser-financed programming of the present or foreseeable quantity and quality, free of direct charge to the public." [26] We believe that the existing conventional television structure performs a valuable service to the public and that our statutory mandate to act in the public interest requires that we strive to maintain the public's ability to receive the informational and entertainment programming now provided by conventional television at no direct cost. We also believe that the public interest requires that we encourage the development of alternative media which will increase the number of program choices available to American households. Indeed, Section 303(g) of the Communications Act of 1934, as amended, states that the Commission shall "Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest." It is these two public interest considerations, maintenance of existing sources of programming and development of additional sources, that we must weigh in this proceeding. Our goal is to strike a balance between the two which best serves the long-range interests of the entire public.

145. Because conventional television is confined to a finite broadcast spectrum and must depend upon advertiser support, the programming it provides is limited in quantity and must appeal to the tastes of a broad majority of the viewing public. Since conventional television often cannot, because of its nature, cater to minority tastes and interests, we encourage the development of new technologies which promise viewing diversity. Subscription television promises to bring both diversity of programming and diversity of format to those who are willing to pay a direct charge for the service. Neither STV nor cable television must attract advertiser support with programming having a broad mass appeal. Cable television, with its abundant channel capacity, is particularly able to program for audiences with specialized interests. Subscription television's potential to expand the public's program choices, to supplement the programming now provided by conventional television, gives it an important role to play in our national communications structure. It is this supplemental role that our subscription programming rules are designed to promote, while at the same time insuring that the public's reliance on conventional television is not unreasonably impaired.

146. Since 1955 the Commission has been engaged in weighing the arguments of those who claim that subscription television, left unrestrained, will topple the existing conventional television structure, and those who assert that subscription television should be given the opportunity to freely compete with the established conventional television structure. During the course of this debate, the Commission has authorized over-the-air subscription television service and promulgated rules designed to insure that subscription television evolves to supplement present conventional television service and not supplant that service. In so doing, we have recognized that the public interest re-

[26] *First Report in Docket 11279*, FCC 57-1153, 23 FCC 532, 542 (1957).

quires both the maintenance of the existing conventional television structure and the development of alternative sources of television programming, and have sought to establish the kind of regulatory framework in which both conventional television and subscription television can co-exist.[27] In Docket 19554 we have undertaken an extensive review of that framework to determine whether our present subscription programming rules are appropriate in light of our regulatory goals. This review has led us to the conclusion that a number of changes are warranted.

Jurisdiction

147. The Commission has been given broad authority to regulate "interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, nationwide wire and radio communications service with adequate facilities at reasonable charges . . ."[28] Notwithstanding this broad authority, several parties to this proceeding assert that it is not within the Commission's jurisdiction to place restrictions on subscription programming, particularly with regard to cable television, and that such restrictions are violative of the freedom of speech clause of the First Amendment. It is also asserted that the present program restrictions are vague and overbroad, and that they violate the policy of the anti-trust laws.

148. These jurisdictional and Constitutional questions were decided in favor of the Commission in *National Association of Theatre Owners v. Federal Communications Commission*, 420 F 2d 194 (D.C. Cir. 1969). In upholding the Commission's program restrictions with regard to over-the-air subscription television, the circuit court said, "it seems obvious that the Commission sought only to insure the continuing economic vitality of free television and not to affect the ideas which could be presented on either free or subscription television. Thus, when the net effect of the program restrictions is considered, it seems quite likely that the public in STV areas will receive more rather than less diversity of expression in its television programming." At 208. As to vagueness and overbreadth, the court stated that the Commission's regulations were within the limits set by the courts. The court concluded that "the Commission found that STV would be a beneficial supplement to present television offerings, provided that neither service could acquire sufficient economic power to drive the other from the marketplace. The program restrictions are designed to preserve this balance and to insure against programming duplication . . ." At 208.

149. Although the Commission's rules governing the programming of subscription cable television have not been specifically considered by the courts, the Supreme Court's decision in *United States v. Midwest Video Corp.*, 406 U.S. 649 (1968), provides ample justification for the action which we have taken. At issue before the court was the propriety of the Commission's now defunct mandatory origination rule. Like subscription cablecasting, the local originations required by the Commission's rule under attack did not make use of the broadcast spectrum. The Supreme Court stated, "But the regulation is not the

[27] See paragraphs 10 and 11, *supra*.
[28] 47 U.S.C. 1.

less, for that reason, reasonably ancillary to the Commission's jurisdiction over broadcast services. The effect of the regulation, after all, is to assure that in the retransmission of broadcast signals viewers are provided suitable diversified programming . . ." At 669. Upholding the origination rule, the court said, "In sum, the regulation preserves and enhances the integrity of broadcast signals and therefore is 'reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting.'" At 670. We believe that it is even more clear in the case of our subscription programming rules that the action we have taken is designed to enhance the integrity of broadcast signals and is a proper execution of our responsibility under Section 2(b) of the Communications Act of 1934, as amended.[29]

150. The remaining question concerns the effect of the program restrictions upon competition between subscription and conventional television. That our rules affect competition between the two forms of television is apparent and uncontroverted. The proper question is not whether our rules affect competition, but whether the public interest considerations which underlie the rules outweigh the public interest considerations in support of unfettered competition. This Commission has consistently stated that unregulated competition by cable television and both forms of subscription television could have serious adverse effects upon the existing conventional television structure and we have taken steps to shield that structure from what we regard to be destructive competition. In the *Second Report and Order in Docket 14895, et al.*, FCC 66-220, 2 FCC 2d 725, 736 (1966), we said "our determination to adopt the carriage and nonduplication requirements rested on two basic grounds: (1) That failure to carry local stations and duplication of their programs are unfair competitive practices, which are inconsistent with the supplementary role of CATV . . ., and (2) that these requirements were necessary to ameliorate the risk that the burgeoning CATV industry would have a future adverse impact on television broadcast service, both existing and potential. . . ." Upholding the cable television rules, the Supreme Court in *United States v. Southwestern Cable Co.*, 392 U.S. 157, 175, (1968), concluded that "The Commission has reasonably found that the achievement of each of these purposes [regarding the structure of conventional television] is 'placed in jeopardy by the unregulated explosive growth of CATV.'" (citation omitted). The rationale underlying the cable television signal carriage and nonduplication rules is similar to that of the subscription program restrictions. In both instances, the public interest in maintaining the conventional television structure has outweighed the interest in unregulated competition.[30]

[29] *See* paragraphs 10 through 14 *of Memorandum Opinion and Order in Docket 20018, et al.*, FCC 74-1278, 49 FCC 2d 1078 (1974). Reaffirming our intent to preempt regulation of access channels, we concluded that our jurisdiction over cable television extends to non-broadcast services because they are "reasonably ancillary" to our jurisdiction over broadcasting.

[30] As we have previously stated, "Our concern, as it must be, is with the over-all public interest and not with protection of any existing service as such. It may well be that competition between conventional and subscription TV for viewing audience and program material may result in improved and more varied fare, both for subscription viewers and those who continue to rely on conventional television. But we also emphasize that we regard the preservation of conventional television service and the continued availability of good program material to the free service as extremely important considerations." *Further Notice of Proposed Rulemaking and Notice of Inquiry in Docket 11279*, 7 RR 2d 1501, 1508 (1966).

151. A number of parties to this proceeding suggest that the Commission obtain Congressional guidance before it establishes any policy which would permit subscription interests to use programming now found on conventional television. Similar suggestions were presented prior to our authorization of over-the-air subscription television in 1968. In a letter dated September 3, 1968, to the Honorable Harley O. Staggers, Chairman of the House Committee on Interstate and Foreign Commerce, then Chairman Rosel H. Hyde of this Commission stated:

> Subscription television has been the subject of formal Commission consideration for some 13 years and, in view of that background and the present circumstances, the Commission has found it necessary to determine its future course of action. We believe that we cannot, consistent with our responsibilities to the public, continue to delay resolution of this important question. Indeed, further substantial delay in this matter would constitute, in effect, a failure of the administrative process. We therefore propose to take up the matter for consideration at an early date looking toward further Commission action on the long-pending issues before the end of this year.[31]

In the six years since our STV decision, Congress has not seen fit to establish guidelines with regard to subscription television. We now have substantial evidence before us which indicates that the subscription television rules should be revised. We believe that this evidence cannot be ignored and that our responsibility to the public requires today's action. We emphasize, however, that our action today does not foreclose the opportunity for judicial review or full congressional review should such action be considered appropriate.

General Discussion

152. In our *Further Notice*, the scope of this proceeding was expanded to include three new issues; the warehousing of feature films, the appropriateness of revising the over-the-air subscription rules as well as the cable rules, and the need for a reporting procedure for new subscription cable operations. The warehousing issue will be discussed in conjunction with our consideration of feature films, paragraphs 180–182, *infra*. The remaining issues are discussed in the succeeding paragraphs.

153. The arguments in opposition to making the over-the-air and cable subscription rules uniform are based primarily on the theory that since STV operations make use of the broadcast spectrum where cable operations do not, the two services are not susceptible to uniform regulation. It is asserted that the cable rules need not be as strict as the STV rules. We must reject this argument. The subscription program restrictions placed on both STV and cable operations are meant to insure that programs now provided over conventional television are not siphoned away to subscription television. The rationale behind the anti-siphoning rules applies equally to both forms of subscription service, and whether the broadcast spectrum is used is not an issue. Special obligations are placed on STV operations by Sections 73.642, 73.643 (c) and (d), and 76.644 of the Rules which result from STV's use of the broadcast spectrum. But with regard to subscription programming, we see no justifiable distinction between over-the-air and cable operations which would warrant unequal

[31] *See* paragraphs 13 through 19, *Fourth Report and Order*, FCC 68–1174, 15 FCC 2d 466, 469–472 (1968).

treatment under our rules. Therefore, we have decided that our subscription program restrictions should be applied uniformly to both STV and cable operations.

154. The suggestion, advanced by theater owners and supported by many parties to this proceeding, that the Commission require notice prior to the commencement of subscription cable operations merits serious consideration. Whereas STV operations require licensing by the Commission, there is presently no Commission requirement that cable operators advise the Commission as to their subscription activities. We recognize that some reporting procedure is necessary to keep the Commission informed as to the growth and development of subscription cable operations. The Commission's Annual Report of Cable Television Systems (Form 325) would seem to be the appropriate vehicle through which to obtain the needed information without materially adding to the paperwork burden now placed on cable operators by our rules. However, in light of our intention to undertake a wholesale review of Form 325, as we are now doing as to the Cable Television Annual Financial Report (Form 326),[32] we have decided to defer action on the subscription notice proposal and take up the matter in a separate proceeding along with other proposed revisions of Form 325.[33]

155. The comments contain a number of suggestions which would expand the scope of the subscription rules and place additional obligations upon subscription entrepreneurs. Broadcast interests have long contended that the subscription program limitations should apply to all cablecasting; not just cablecasting for which a per-channel or per-program charge is made.[34] It is argued that all forms of cablecasting have the potential to siphon programming from conventional television and that cable interests could easily circumvent the present anti-siphoning rules by incorporating cablecasting fees into the charges assessed for regular subscriber service.

156. We believe that there is little likelihood that the anti-siphoning rules will be circumvented in the manner suggested above. In light of the fact that fewer than fifty percent of cable subscribers now choose to subscribe to a pay channel where one is offered, it seems unlikely that system operators could incorporate special subscription fees into basic subscriber charges without incurring major subscriber losses among those not wanting the additional subscription service. On the other hand, our policy of encouraging origination cablecasting is furthered by permitting cable operators to supplement their origination programming with some feature films, sports events and series programs. It seems most unlikely that sufficient revenues could be generated by such programs to pose a siphoning threat. Therefore, we will decline to make our anti-siphoning rules applicable to origination cablecasting for which no special charge is made. Should it come to our attention at a future date that the intent of the anti-siphoning rules is being frustrated in the manner suggested by the broadcast

[32] *Notice of Proposed Rule Making in Docket 20247*, FCC 74–1270, 49 FCC 2d 911 (1974).

[33] The Commission is currently considering rules which would require the maintenance of program logs for cablecasting activities. *Notice of Proposed Rule Making in Docket 19128*, FCC 71–45, 27 FCC 2d 18 (1971).

[34] *See*, "MST Petition for Reconsideration" of *Memorandum Opinion and Order in Docket 18893* filed by the Association of Maximum Service Telecasters, Inc., on August 6, 1970, and paragraph 34, *supra*.

interests, we will at that time consider broadening the applicability of the rules.

157. Many broadcast interests suggest that pay operations be limited to one channel on cable television systems, and that pay cable operators be required to originate a substantial number of hours of non-pay programming to equalize pay cable's role with that of over-the-air subscription television. As we pointed out in paragraph 153, *supra*, both pay cable and STV present siphoning potential, and the program restrictions should apply uniformly to both services. There are substantial differences between the two services, however, and we have adopted regulations tailored to the particular characteristics of each. Since STV makes use of scarce spectrum space, Section 73.642 of our Rules limits STV to one station per market and Section 73.643(c) requires a minimum number of hours of non-subcription programming. Cable television, on the other hand, does not make use of broadcast frequencies and has extensive channel potential. Substantial public service obligations are placed upon cable television by Sections 76.251 and 76.253 of the Rules, which require that channel space and production facilities be made available for government, educational and public use. We see no interest to be served by restricting the number of subscription channels to one per cable system and by requiring non-subscription programming on pay channels where sufficient channel space is available to meet public service programming needs.

158. It is suggested that the anti-siphoning rules be made applicable to all forms of subscription program distribution, including Multipoint Distribution Service (MDS), laser and closed circuit systems. The transmission of program material to hotels and similar locations is presently the subject of a rule making proceeding in Docket 19671 [35] and the question of whether the anti-siphoning rules should cover these other distribution services will be considered in the context of that proceeding. Therefore, we will confine our decision in the instant proceeding to cable television and STV service.

159. Finally, it is suggested that the Commission's rules require a minimum amount of educational and cultural programming on subscription cable channels, encourage minority participation in subscription cablecasting, regulate the rates which may be charged for subscription programming, and establish various other requirements directed toward minority interests. Although these suggestions might be appropriate for Commission consideration, we are not disposed to expand the scope of this proceeding into areas not germane to the subject of program siphoning. Our long pending study of the subscription program rules should not be further delayed by consideration of tangential issues. We think the better course is to take up these other issues as part of a separate proceeding initiated by an appropriate petition for rule making.[36]

[35] *Notice of Inquiry and Notice of Proposed Rule Making and Memorandum Opinion and Orders in Docket 19671*, FCC 73-73, 39 FCC 2d 527 (1973).

[36] This is consistent with our statement in paragraph 23 of *Memorandum Opinion and Order in Docket 20018, et al., supra* note 30, where we denied a request of the National Black Media Coalition for reconsideration of the *Clarification of Cable Television Rules and Notice of Proposed Rule Making and Inquiry*, FCC 74-384, 46 FCC 2d 175 (1974). There the Coalition had asked for new rules applicable to channel lessees regarding nondiscrimination in hiring and programming.

Feature Films

160. Cable television proponents devote a great deal of attention in their comments to the proposal that the feature film program restrictions be suspended until the alleged siphoning potential of subscription television is substantiated. It is submitted that the siphoning argument propounded by the broadcast interests is speculative; that no evidence has been presented indicating that siphoning has ever taken place; and that program restrictions should not be imposed until their need has been clearly established. In reply to these arguments, subscription opponents contend that the siphoning *potential* of subscription television has been clearly established and that prophylactic measures should be taken now rather than later when siphoning will have taken place and the imposition of program restrictions will disrupt the established viewing habits of subscription television patrons.

161. We have studied the evidence and have concluded that preventative measures are needed to avert the potential ill effects of siphoning before they are actually felt. We have previously stated that "Remedial action in this area should not wait upon the threat becoming actuality . . . Protection of the public requires that action be taken at a time when it involves no disruption of existing patterns." [37] When the STV rules were adopted in 1968, we said:

> We cannot agree with those who urge that the type of programming that STV will show is known, that it is clear that it will not siphon from free TV, and that therefore no rule is necessary. The ultimate path that STV will follow is not clearly known. . . . we would be remiss in our duties if we did not take regulatory steps to afford some assurance that free TV will continue to be available in ample quantity and quality.[38]

The six years since that statement was made have not provided us with a clear picture as to the effects of subscription television upon conventional broadcasting. The cable television industry is still in its early stage of development; the first STV station has yet to become fully operational. However, our experience since 1968 substantiates the basic conclusion upon which the program restrictions were premised—that subscription programming will consist largely of feature films, series and sports events, all of which are mainstays of conventional television programming. Whatever cable television and STV might become in the future, and we believe that their potential to serve the public is great, the evidence clearly shows that a primary element of subscription programming will continue to be programs which have broad public appeal similar to what is found on conventional television. The availability of this programming to conventional television should be maintained to preserve the quantity and quality of programming now delivered to the public by the conventional system.

162. We have not been persuaded that a moratorium on the feature film provision is appropriate. The evidence indicates that many of the films shown on conventional television are desired for subscription exhibition and that reasonable restrictions are required to insure that subscription television continues to be an optional alternative to conventional television and does not become the exclusive television outlet for feature films. Even at its present subscriber strength, sub-

[37] *Memorandum Opinion and Order in Docket 18397, supra* note 8, at 828.

[38] *Fourth Report and Order, supra* note 4, at 556.

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scription cable television could delay the exhibition of films on conventional television. The film producer has an economic incentive to exploit the subscription market prior to a film's sale to conventional television. As subscribers become more numerous, subscription runs, and reruns, will become more lengthy. At some point, the potential subscription audience will be sufficiently large to cause the permanent withdrawal of at least the most popular films from conventional television. While some delay of the conventional exhibition of feature films may be unavoidable because subscription exhibitions of new films may take place before conventional exhibitions, just as theater exhibitions now precede television exhibitions, long delays or complete withdrawl from the conventional market can, and should, be avoided. Consistent with subscription television's supplementary role, the public's choice to view films either on subscription or conventional television should be maintained. Our rules are designed to maintain that choice while providing for the orderly development of both the subscription and conventional television industries. We believe that the existing regulatory framework for subscription programming should be retained, even though the industry is not fully developed, so that subscription entrepreneurs can exercise their business judgment with reasonable certainty as to the rules of the game. The evidence before us demonstrates that our concern with feature film siphoning is real, not imagined, and that the protection afforded the public by our rules will increase in importance along with the growth of the subscription industry. We intend to proceed with our established policy in an orderly fashion, refining our rules as we gain experience. Our experience to date suggests that our existing rules should be revised in several areas, and these revisions will be discussed in the succeeding paragraphs.

163. The present feature film rule is applied to all cable television systems and STV stations without regard to the conventional television markets in which they are located. The new feature film rule, like the existing sports rule, will take a market approach for determining when a program is available for subscription use. The relevant television market for STV stations and cable television systems will be defined somewhat differently, reflecting the Commission's respective regulations governing the operation of the two services.

164. For purposes of our new subscription rules, the market of an STV station is defined to include all commercial television broadcast stations which place a Grade A contour entirely over the community to which the STV station is licensed. This is consistent with Section 73.642 of the rules, which states that an STV authorization will be issued only for a station the principal community of which is located entirely within the Grade A contours of five or more commercial television broadcast stations, including the station of the applicant. The rules regard these stations as "local," *i.e.*, they provide television service to the community of the STV operation.[39] The market of a cable television system is defined to include all commercial television broadcast stations which are required to be carried by the system upon request of the respective stations pursuant to Subpart D of Part 76 of

[39] See paragraphs 155–179, *Fourth Report and Order in Docket 11279; supra* note 4, at 515–523.

the Commission's Rules. These "must carry" stations are considered to be "local" stations by the cable television signal carriage rules, *i.e.*, these stations generally are licensed to serve the audience located within the community served by the cable system upon which carriage is required.[40] In the very rare case where the signal carriage rules do not require a cable system to carry any commercial television broadcast stations, compliance with the subscription program rules will not be required.

165. For STV stations and cable television systems subject to the "must carry" requirements of the signal carriage rules, subscription use of feature films will be limited to four situations. The first is when the film to be cablecast or broadcast is less than three years old. This new provision provides an additional year during which films may be exhibited by subscription television. We have determined that the present two-year rule does not provide sufficient time for the subscription exhibition of some feature films. While most films conclude their theatrical run twelve to eighteen months after theatrical release, some "blockbuster" films run considerably longer. Even for the average film, the present rule generally allows for only a six to twelve month subscription run. Because of scheduling practices and various other difficulties, we think that such a period is unduly restrictive. By expanding the feature film rule to permit subscription use of films during the first three years after their theatrical release, we believe that almost all films will be allowed some subscription exposure, and most films will be available for twelve to eighteen months. For the rare case where a film runs for three years in theaters, its subscription use may be permitted by the other provisions of the film rule.

166. We believe that the three year provision provides a reasonable balance between the interest in allowing for subscription exposure of new films and the interest in their timely exposure over conventional television. Few films are televised before they are three years old, and most are four years or older before their first telecast. Therefore, we expect our new rule to provide for an adequate period for the subscription use of most new films without detracting from the public's ability to view them over conventional television.

167. The term "feature film" refers to a film which is produced to be released in theaters where an admission fee is charged. A movie which is produced specifically for television exhibition is not a "feature film" for purposes of our rules. The age of a feature film for the purpose of our rules will be computed from the date of general release in theaters. By "general release" we mean the first showing of a feature film in theaters on a non-reserved seat basis with continuous performances in several theaters throughout the United States. "General release" does not include special situations such as the first run "road show" or "reserved performance" showing of a feature film, which means the showing of a film on an exclusive basis at usually one theater in an area, with non-continuous performances where the theater is cleared after each showing, usually at prices greater than the normal general release admission price.

168. The second situation in which a feature film will be available for subscription use is when the film is available for telecast by a con-

[40] See paragraps 78–87, *Cable Television Report and Order, supra* note. 9, at 173–176.

ventional broadcast station located in the market of the subscription station or cable system. When a film becomes available for conventional television exhibition, the issue of program siphoning disappears, as does the need for anti-siphoning restrictions. In such a situation, the public interest in receiving a film over conventional television has been realized and there is no longer any justification for restricting the exhibition of the film by subscription television. Since the public is able to view the film over conventional television at no charge, those who choose to pay a special fee to view the film over subscription television should not be prevented from doing so by our rules.

169. To determine when a film is available for conventional telecast, the rules look to whether a conventional broadcast station in the market has a present contractual right to exhibit the film. A film under contract, but which is not available for exhibition until some future date, will not be considered as available for telecast. This distinction between films which are under contract and those which are available for telecast is necessary to remove any incentive on the part of the program producer to demand film contracts which call for long periods between contract date and first telecast availability date during which the films could be sold for exclusive subscription exhibition. Therefore, the subscription exhibition of a film will be restricted to the period between the date specified in the television contract at which the film may be first exhibited, and the date at which the film may no longer be televised. If the television contract calls for a certain number of conventional telecasts during a specified period, the rules will allow for subscription exhibition from the film's "availability date" for first conventional telecast to the date when the broadcaster's right to telecast the film is terminated.

170. For the purposes of this provision, a conventional television station affiliated with a television network will be deemed to hold a present contractual right to exhibit a film if the network to which it is affiliated holds such a right. Where a television station may exhibit a film provided by a television network, or where the station itself contracts for the film's exhibition, siphoning cannot result and there is no need for subscription restrictions. Therefore, our rule will permit the subscription use of films which are available over conventional television pursuant to either local station contracts or network contracts.

171. The foregoing "under contract" provision is premised upon the existing pattern of feature film distribution. Comments filed in this and other proceedings indicate that films are generally sold to conventional television individually or in packages for extended periods and multiple showings or runs. A typical feature film contract might provide for five to seven showings of a film during a five to six year period, or for 120 showings of a fifty-film group during the same period.[41] We do not expect this pattern to change as a result of the operation of our subscription rules. Indeed, if the provisions of film contracts are altered, our conclusions underlying the subscription rules may become invalid, requiring refinements in the rules. Therefore, we intend to watch closely for modifications in feature film contracts which might place the effectiveness of our rules in question. Should new patterns of feature film distribution develop, such as a contraction or expansion of

[41] *See* paragraph 2, *Further Notice of Proposed Rule Making in Docket 18179*, FCC 71-42, 27 FCC 2d 13, 14 (1971).

the customary length of availability periods in relation to the number of permitted showings, we may be required to take a second look at our subscription rules and, if necessary, adjust them to reflect the change in circumstances.

172. The third situation in which a feature film will be available for subscription use is when the film has been in general theatrical release for ten years and has not been exhibited over conventional television in the market for three years prior to its proposed subscription exhibition. This provision is designed to replace the existing provision which limits the number of older films which may be exhibited by subscription television to one film per month. It is argued that the present rule is overbroad because it does not permit the subscription exhibition of thousands of older films which are not desired for conventional television exhibition. The comments of Metromedia indicate that only one half of the films outstanding are suitable for conventional television exhibition, and that only about 23 percent could be called desirable. (See paragraph 38, *supra.*) Therefore, it is claimed that the present rule precludes the subscription use of many films which are not wanted by and would never appear on conventional television. Since these films are not shown over conventional television and siphoning is not at issue, it is said that our rules should not restrict their subscription use. We agree with this contention and we have adjusted our rules accordingly.

173. Our new provision applies only to feature films which are more than ten years old. Generally, by the time a film is ten years old it has completed its theatrical run and has been available for both network and syndication exhibition for several years. If such a film has received no conventional television exposure in a market over a three-year period, it is reasonable to expect that the film is not particularly desirable to television stations in that market or that it will never be made available for conventional telecast. An example of such films would be those which are not rated for family viewing. If we find, however, that our rules are being used to keep desirable films off conventional television, it may be necesary for us to revise these rules.

174. Feature films are typically made available for purchase by conventional television during or immediately after their theatrical run. Motion picture interests claim that film producers are required to sell their product to television as soon as possible in order to obtain needed revenue. It is said that many films do not generate enough revenue in theaters to cover their production costs, and that producers depend upon television sales to recover their expenditures. Because producers are anxious to sell their works to television, desirable films generally have been purchased for television exhibition soon after their theatrical run, although they are often rested for sometime before they are actually telecast. If a film is purchased by a television network, it is generally offered for sale for local syndication soon after the expiration of the network contract or even during the network contract. Older films not under either a network or syndication contract are typically those which are undesirable to stations in the market or which will never be made available for television exhibition. This marketing pattern indicates that films not exhibited over conventional television for a significant period of time are not highly desirable and that their use by subscription interests will have little or no effect on conven-

tional television programming. We have decided that a film over ten years old which has not been exhibited in the market for a period of three years is, as a general rule, either undesirable or permanently unavailable to conventional television stations in the market and should not be precluded from subscription use. The record indicates that economic pressures will not permit film producers to withhold desirable films from the conventional television market for three years in order to sell them for exclusive subscription use. We are persuaded that those films which have not been exhibited by conventional television for this period of time need not be precluded from the subscription market should sufficient damand develop to warrant their exhibition on a subscription basis.

175. Once a film has been exhibited on a subscription basis pursuant to the provision discussed in the preceeding paragraph, our rules will not preclude subsequent subscription showings even though the film is occasionally exhibited over conventional television. The rules assume that any film over ten years old and not exhibited in the market over conventional television during the past three years is generally undesirable for conventional exhibition. But to the extent that there may be some conventional television market for these films, our rules should not discourage their sale to conventional television by precluding subscription exhibitions for three years after each conventional telecast. Therefore, the new rules will leave such films available to both conventional and subscription television once it has been established that they are not generally desirable for conventional exhibition and they have been exhibited by subscription television.

176. We believe that this provision accomplishes our objective to prevent siphoning and does not unfairly restrict the film product available for subscription use. Absent evidence to the contrary, it is unreasonable to assume that motion picture interests will forego potential revenues from conventional television for a period of at least three years in order to "save" an older film for the subscription market. Such action seems particularly unlikely where the motion picture interest may sell his product to conventional and subscription television simultaneously pursuant to our new rules. On the other hand, this new provision will make available for subscription use thousands of older films which have not been exhibited over conventional television and which were previously precluded from subscription exhibition. We wish to make absolutely clear, however, that our intent is not to encourage the withholding of films from conventional television. Our conclusion is that film producers and distributors will not seek to withhold their product from the conventional television market. Should this conclusion be placed in question, we may be required to lengthen the required hiatus period or otherwise revise the rule to ensure its effectiveness.

177. Foreign language films constitute the fourth category of feature films made available for subscription use by the new rules.[42] We have consistently encouraged the dissemination of foreign language programming and in the case of cable television signal carriage have determined that foreign language programming would have no significant impact upon local television service.[43] Similarly, we foresee little likelihood that the unrestricted subscription use of foreign language films will have a significant impact upon conventional television programming. Therefore, we are not prepared to restrict the subscription use of foreign language films at this time. We recognize, however, that there are some television broadcast stations, such as the Spanish language stations in the southwest, which televise primarily foreign language programs. Should it be demonstrated that foreign language films are being siphoned away from these broadcast stations by subscription operations, we will consider remedial action on an *ad hoc* basis.

[42] Foreign language films for purposes of this provision include all films with predominantly non-English discourse. Such films would include domestic films dubbed in a foreign language, but not foreign produced films dubbed in English. In Puerto Rico, films with English discourse will be considered to be foreign language films. *See, Cable Television Company of Puerto Rico*, FCC 74-497, 46 FCC 2d 1096 (1974).

178. We believe that the foregoing provisions focus sharply on the problem of feature film siphoning, provide adequate protection against that eventuality, and make available sufficient feature film product to satisfy the needs of the subscription television industry. However, we realize that there will be instances where the new rules will preclude the subscription exhibition of feature films which would in any case not be shown over conventional television. Therefore, we have retained the waiver policy announced in paragraph 287 of the *Fourth Report and Order*.[44] Pursuant to this policy, waivers will be granted upon a convincing showing to the Commission that a film desired for subscription exhibition is not desired for exhibition over conventional television in the market, or that the owner of the film, even absent the existence of subscription television, would not make the film available to conventional television.

179. Subscription entrepreneurs will be required to maintain public files listing each feature film exhibited, the date of its exhibition and the provision of these rules pursuant to which it was exhibited. When a film is exhibited pursuant to the "under contract" provision, the station or network serving the market and holding a present contractual right to exhibit the film must also be specified. These records are needed to preserve data relative to the subscription use of feature films and to afford the Commission and members of the public an opportunity to ensure that compliance with the rules is being achieved.

180. In the *Further Notice* of this proceeding, we asked for comment on the alleged warehousing of feature film product by television networks. Subscription interests have expressed concern that the intended operation of our rules is being frustrated by the preemptive purchase of feature films by national networks and by their purchase of exclusive rights to some films which they have no intention of ever exhibiting. In reply to these allegations, network officials have stated that it is not their policy or intention to negotiate exclusive contracts for films which unnecessarily impinge upon the ability of subscription operations to exhibit them.[45] We assume the sincerity of these

[43] *See* paragraph 96 of *Cable Television Report and Order*, *supra* note 9, at 180–181.

[44] *Supra* note 4, at 557.

[45] Mr. Everett Erlick, speaking for the American Broadcasting Company, stated ABC's policy as follows: "If we do not have the right to telecast a title within two years following first theatre exhibition, we do not seek exclusivity against pay cable during that two year period. Where we do acquire broadcast rights within 30 months or less, we will seek exclusivity for up to 6 months as a reasonable resting period prior to permissible play date. Where the permissible play date is 30 months or later after theatrical exhibition, we negotiate reasonable exclusivity provisions subject to the Commission's two year rule." October 25, 1974 oral argument transcript at page 1503.
In written comments filed on October 25, 1974, the policy of CBS, Inc., was stated as follows: "In its most recent major feature film negotiation (completed July, 1974) CBS

(Continued)

expressions and will expect the networks to refrain from demanding exclusivity provisions in their feature film contracts with producers which preclude subscription exhibition of films for an unreasonable length of time prior to their network showing.

181. Notwithstanding this denial of warehousing practices by the national television networks, the question of warehousing alludes to a larger, more fundamental question. That is, should the Commission's rules prohibit or limit in any way the purchase of exclusive rights to programming by conventional television as against subscription television? The effect of our anti-siphoning rules is to reserve programming for use by conventional television. Without these restrictions, programs now found on conventional television might be bid away by subscription interests, thereby threatening the established broadcast structure. But having restricted the use of programming by subscription television in order to conserve conventional television programming, should we then allow conventional television to further restrict the programming available to subscription television by demanding exclusive rights to programs? Or, does the public interest require, in addition to the anti-siphoning protection afforded conventional television, measures which limit or prohibit conventional television from excluding the subscription industry from access to programs which conventional television holds present or future rights to exhibit and where the danger of siphoning is not present?

182. In Docket 18179 we established an inquiry with respect to the availability of programming to commercial television stations and cable systems. In the *Further Notice* in that proceeding we sought comments on whether the Commission should prohibit exclusive program contracts *vis-a-vis* television stations and cable systems.[46] In a separate document to be issued today, we are commencing a new proceeding inquiring into the question of whether the Commission should adopt rules restricting the ability of conventional television networks and stations to require program exclusivity against subscription operations. We intend to thoroughly explore the warehousing issue as well as the more general question of program exclusivity. Should the evidence demonstrate that measures are required to prevent unreasonable restraints on the program product available to the subscription television industry, we will consider adopting new rules designed to limit or remove such restraints.

183. In adopting the foregoing rules, we are not unmindful of the comments of the National Association of Theatre Owners (NATO)

(Continued)

agreed to waive any exclusivity against pay cable exhibition for a period of two years after the theatrical release date of each film involved. It is our present intention, as a matter of policy, to apply the pattern established in that transaction to our other feature film purchases, except in cases where CBS acquired the right to broadcast, and expects to broadcast, a particular film within or very shortly after two years from the date of theatrical release. In such cases, the network will seek exclusivity for a reasonable period in advance of the expected broadcast of the film." At page 2.

The policy of the National Broadcasting Company, Inc., was stated in written comments filed on September 20, 1974: "The NBC Television Network does not attempt to prevent a film supplier from licensing pay cable within the two year period permitted by the rule where the film is not available to the network until subsequent to that two-year period. Furthermore, the usual feature film contract which NBC has recently been entering into calls for about two plays over about two or three years from the date the producer agrees to make the film available to us, so there is no possibility of "'warehousing.'" At page 21.

[46] *Further Notice of Proposed Rule Making in Docket 18179*, FCC 71-42, 27 FCC 2d 13 (1971). The issue of availability of programming to cable systems was later deleted from the inquiry in a *Second Further Notice of Rule Making in Docket 18179*, 37 Fed. Reg. 7531 (1972).

which suggest that we adopt rules designed to protect the motion picture theaters in the United States from subscription television competition. Their urging that we take such action raises the question of whether our jurisdiction extends to the adoption of rules of this type and, assuming the regulations suggested do not exceed our jurisdiction, whether a case has been made for their adoption.

184. Concerning the first of these questions, the Department of Justice has stated in its comments that "Congress has not conferred upon the Commission either the jurisdiction or the authority to balance these non-broadcast related interests in regulating the broadcast and related interests." NATO's acknowledgement that there is question as to the extent of the Commission's jurisdiction is brief and its support for such jurisdiction principally relies on analogy to the Commission's adoption of equal employment opportunity rules. In taking its actions in the area of equal employment, NATO notes, the Commission acknowledged the contribution the rules would make "toward reducing and ending discrimination in other industries." 16 RR 2d 1561, 1563. Reference is also made to "Report of Subcommittee No. 6, Select Committee on Small Business, 89th Cong. 2d Sess.," wherein the Commission was urged to consider the interests of small businesses in adopting advertising regulations.

185. We find, however, no evidence of any substantial sort that NATO's dire predictions of the collapse of urban centers will in fact occur, and thus need not resolve the jurisdictional question. In the absence of any stronger showing than has been made, we do not think it necessary to proceed further in this area and are not adopting the rules which the theater owners have suggested.

Sports

186. Most parties agree that some restrictions are needed to insure that the quantity and quality of sports events now shown over conventional television is not diminished by subscription operations. Unlike feature films which have continuous audience appeal, sports events have substantial entertainment value only at the time of their occurrence. Thus, with regard to sports events, our anti-siphoning rules must address the question of *which* programs should be reserved for conventional television rather than *when* they should be reserved, as was the case with feature films.

187. In keeping with our established policy, the new sports rules are designed to restrict the subscription exhibition of events which have been regularly televised in a community on a non-subscription basis, thereby assuring the public that the events now viewed over conventional television are not siphoned away to subscription operations. In determining whether a sports event has been televised in a community on a nonsubscription basis, the existing rules consider only those commercial television broadcast stations which place a Grade A contour over the entire community. This standard has been retained for purposes of the STV rule, but a new standard has been adopted for purposes of the cable television rule. Consistent with the television market definition incorporated in the cable television feature film rule (paragraph 164, *supra*), in determining whether a sports event has been televised in a community on a nonsubscription basis, the new cable sports rule will consider all commercial television broadcast stations

which are required to be carried on the cable system upon demand pursuant to the cable television signal carriage rules. Accordingly, an event will be considered to have been broadcast in the market of an STV station if the community to which the station is licensed lies wholly within the Grade A contour of a nonsubscription commerical television station broadcasting the event. An event will be considered to have been broadcast in the market of a cable television system if the event was broadcast by a nonsubscription commercial television station which the cable system is required to carry upon demand of the station pursuant to the signal carriage rules.

188. The original sports rules for both STV and subscription cable television restricted the live subscription use of events which had been previously shown live over conventional television. In the 1972 *Report and Order in Docket 18893*, the sports rule applied to STV was revised to limit subscription use of events, either live or on a same-day delayed basis, which had been previously televised, either live or on a same-day delayed basis.[47] These changes were made because the Commission was concerned about situations where the delayed exhibition of an event amounts in effect to a "live" showing. Thus, in paragraph 13, the Commission stated:

> It is clear, for example, that instant replays [taped delays] could siphon sporting events just as surely as live showing of those events could. Thus, as MST states, the entire World Series could be put on instant replay over STV under the proposed rules regardless of the fact that this event had in the past been regularly shown over conventional television.[48]

With regard to providing anti-siphoning protection to events which had been previously televised on a delayed basis, Mr. John R. Fitzgerald in his comments pointed out that certain events had been televised in New York on a one or one-half hour delayed basis and that these events should be protected from siphoning. Noting this, the Commission said, "Thus, we think it clear that protection should be given in the type of situation mentioned by Fitzgerald where the delayed viewing of the event is virtually like viewing it live." [49]

189. We remain of the opinion that where the delayed exhibition of an event is "virtually like viewing it live," the anti-siphoning rules should treat the event as if it were exhibited live. However, when the delayed exhibition occurs after the event has been played, the exhibition is no longer virtually like a live exhibition and the rules should recognize that fact. Since the public interest in viewing a sporting event is greatest at the time the event is actually being played, our rules should encourage its live exhibition over conventional television. On the other hand, a few people might be willing to pay to view an event after its conclusion and we see no reason to preclude this opportunity. These considerations have persuaded us that the best course is to make the anti-siphoning rules applicable only to live exhibitions, but to define the term "live" as any telecast or cablecast that is simultaneous with the actual occurrence of the event or the delayed tape showing of which is begun while the event is still in progress. Thus, the rules will permit the delayed subscription exhibition of any sports event, and will not proscribe the live subscription exhibition of an

[47] *Supra* note 13, at 274–276.
[48] *Id*, at 274.
[49] *Id*, at 276.

event which was previously televised on a delayed basis over conventional television. We feel that this provision best serves the vast majority of people who would rather view a sporting event live, as well as those who would still be interested in viewing the event after its result is known.

190. Some confusion may develop in applying our definition of live telecasts to events such as auto races, golf matches and the Olympics, which take place over an extended period of time. Typically, only portions of such events are televised and the telecasts often occur on a delayed basis because of such factors as time zone differentials. This is especially true of telecasts of the Olympic games. Consistent with our statement in paragraph 295 of the *Fourth Report and Order in Docket 11279*,[50] and our discussion in the preceding paragraph, if a substantial portion of such games or matches are telecast, and the telecasts take place during the period in which the events are actually taking place (this period may extend over several days in the case of the Olympics), the events will be considered to have been telecast live for purposes of the rules. What will constitute a "substantial portion" of a particular event cannot be narrowly defined due to the diverseness of the events to which the term will be applied. In this area, we must leave it to the parties involved to apply a standard of reasonableness. Should disputes arise, we will consider them on an *ad hoc* basis.

191. The new sports rules continue to define sports events as indicated in paragraph 292 of the *Fourth Report and Order in Docket 11279*,[51] and to divide events into two groups; specific events, such as the baseball World Series or the Football Super Bowl, and non-specific events, such as regular season football or baseball games. The examples listed in paragraph 294 of the *Fourth Report and Order in Docket 11279*,[52] with two exceptions, continue to represent the type of events which will be regarded as specific events within the meaning of the new rules, although the list is by no means exhaustive. The two exceptions are the college basketball National Invitational Tournament (NIT) and professional basketball's NBA championship games. Consistent with our treatment of the NCAA basketball championships, only the final and semi-final games of the NIT playoffs will be regarded as specific events. With respect to the NBA playoffs, only the final seven game series will be regarded as a specific event. For the reasons set out in the succeeding paragraph, the events leading up to these final NIT and NBA playoff games will be treated as non-specific events.

192. We previously recognized in paragraph 297 of the *Fourth Report and Order in Docket 11279*,[53] that certain playoff games such as the NBA and NHL playoffs are customarily regarded as features of the regular sports season and should be classified as non-specific events rather than specific events. The features which we regard as distinguishing non-specific playoff events, such as the NHL playoffs, from specific playoff events, such as the World Series, are the number of games played and the period of time consumed during the playoffs. For instance, the Stanley Cup hockey playoffs involve as many as sixty-one

[50] *Supra* note 4, at 560.
[51] *Id*, at 559.
[52] *Id*, at 559, 560. *See*, also footnote 13 of *Report and Order in Docket 18893*, FCC 72–263, 34 FCC 2d 271, 284 (1972).
[53] *Supra* note 4, at 561.

games and cover a period as long as six weeks. Such contests are distinguished from the World Series, which involves a maximum of seven games and is scheduled to cover a period of less than two weeks. Therefore, except as indicated in the previous paragraph, we will treat these games as non-specific events.

193. Subscription exhibition of specific events is limited to those which have not been broadcast live over conventional television in the market during any one of the five seasons preceeding the proposed subscription exhibition. Application of the five-year standard to cable as well as STV operations is consistent with our findings discussed in paragraphs 8 through 10 of the *Report and Order in Docket 18893.*[54] We have used the term "season" rather than "year." Thus, the rule looks back over the previous five sport seasons rather than the previous five one-year periods or calendar years. As to specific events which do not have commonly defined seasons and recur on an irregular basis, such as heavyweight title boxing matches, they will be treated as set forth in paragraph 40 of the *Report and Order in Docket 18893.*[55] If a regularly recurring event takes place at intervals of more than one year, such as the Olympic games, the event will be precluded from subscription exhibition if it has been broadcast over conventional television in the market during any one of the ten years preceeding the proposed subscription exhibition.

194. When the STV sports rules were amended in Docket 18893, subscription exhibition of new events brought about by restructuring of existing sports was proscribed for a period of five years after their first occurrence.[56] The rules were not made applicable to new events not brought about by restructuring of existing sports. The Commission indicated that it would defer action as to entirely new events until its need had been demonstrated. Discussion of this matter in Docket 18893 centered around new specific events such as the Super Bowl, and no mention was made of new non-specific events such as those played by an expansion team pursuant to an new franchise.

195. While we are persuaded that the existing STV rules applicable to new specific events should be retained and applied to cable operations, we have decided to take a different approach with regard to new non-specific events. A five-year prohibition of the subscription exhibition of all games played by a newly franchised sports team would be overly restrictive. On the other hand, the public interest would not be served if all such games were reserved for exhibition on a subscription basis to the exclusion of conventional telecasts. In order to provide some possibility for subscription television exposure of new non-specific events brought about by a restructuring of an existing sport, while preserving for the public an opportunity to view a portion of these games on conventional television, we have decided to treat these events in a similar manner as those played by previously existing teams. The manner in which this will be accomplished is set out below in paragraph 201.

196. With regard to existing non-specific events, we have departed from the all or nothing approach taken by the present rules and have adopted modified "remainder games" provisions. The concept of "sub-

[54] *Supra* note 13, at 273–274.
[55] *Id*, at 281.
[56] *Report and Order in Docket 18893, Id*, at 282–286.

stantial number" has been retained to distinguish between games regularly televised and games not regularly televised, but the water shed has been specifically set at twenty-five percent. The concept of "categories" has also been retained, but categories of events in each sport for purposes of the rules will be limited to the following: pre-season home, pre-season away, regular season home and regular season away. The four categories that we have specified are generally recognized, and to allow for the application of additional categories would introduce a large element of uncertainty into the sports rules and would likely lead to much confusion.

197. The old "games of the week" category has been eliminated because such games do not usually exist in their own right, but are so called only as a promotional term in relation to their network exhibition. Most games of the week cannot be forecast from league schedules, but come into being only upon their designation by the networks. We have not provided for a category of post-season home or away games with regard to non-specific events because the number of such events to be played by a particular team or individual in any given season cannot be foretold, but generally is determined by some type of playoff procedure. (See our discussion of post-season non-specific events in paragraph 192, *supra.*) Since the new rules assume that the number of events to be played in a category is known in advance of their occurrence and allow for the subscription exhibition of some percentage of this number, non-specific playoff games cannot be easily introduced into our formulae. We have not found a way to completely resolve this problem, but the best procedure seems to be that adopted in the original STV rules.[57] There it was determined to regard non-specific playoff games as part of the regular season rather than a separate category of events. If non-specific playoff events are exhibited by subscription interests, we will expect them to arrange their schedules so that the limitations prescribed by our rules are not exceeded. For instance, if our rules permit the subscription exhibition of twenty percent of the events in a certain category and prior to the playoffs twenty percent have been exhibited, at least five playoff games must be scheduled before an additional game may be exhibited by the subscription operation.

198. We realize that this is not a perfect solution for the handling of non-specific playoff games, but lacking a more suitable alternative, we must trust in the good faith of the parties involved to apply our rules in a manner consistent with their intent. By placing playoff games in the regular season category, we have left open the possibility of "frontloading," *i.e.*, arranging telecasts so that most conventional telecasts take place during the early part of the season, leaving the more popular end-of-season events for exhibition on a subscription basis. It is not our intent that frontloading take place. We expect that the uncertainty as to whether a particular team will reach the playoffs, or if it does, as to whether it will be eliminated at an early stage of the playoffs, will discourage temptations to frontload conventional telecasts. Should our expectations prove wrong, and should we discern the development of a trend to frontload conventional telecasts and "backload" subscription exhibitions, we will be required to take what-

[57] *See* paragraph 297 of *Fourth Report and Order in Docket 11279, supra* note 4, at 561.

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ever additional action is appropriate to preserve the intended operation of the rules.

199. The number of non-specific events which may be exhibited on a subscription basis during any sports season will depend upon the number of such events shown over conventional television during the preceeding "highwater mark" season; that is, that season among the preceeding five seasons when the largest number of events in the relevant category were broadcast. All, or some, of the events not broadcast over conventional television in the highwater mark season—the remainder games—will be available for subscription exhibition, depending upon the level of previous conventional broadcasts. If less than twenty-five percent of the events in a category were broadcast live over conventional television in the market during the highwater mark season, the number of events available for subscription exhibition shall be equal to the number of remainder games in the highwater mark season.

200. If twenty-five percent or more of the events in a category were broadcast live over conventional television in the market during the highwater mark season, the number of events available for subscription exhibition shall be equal to fifty percent of the remainder games in the highwater mark season. This provision relaxes the present restriction which prohibits altogether the subscription exhibition of games in a category of events of which a substantial number were previously carried by conventional television. To discourage a gradual siphoning away of these games from conventional television to subscription television, the events available for subscription exhibition will be reduced when the number of games conventionally televised is reduced from previous seasons. Thus, where twenty-five percent or more of the games in a category have been broadcast live over conventional television in the highwater mark season and the number of games in the category to be broadcast in the current season is a reduction from the number of events broadcast in the highwater mark season, the number of events in the category which may be exhibited on a subscription basis in the current season shall be reduced in proportion to the reduction in events broadcast. Consider the following example: Forty games in a category consisting of eighty games were carried by conventional television in the market in the highwater mark season. This leaves forty as the number of remainder games at the five year high water mark, of which fifty percent, or twenty, are left for subscription exhibition. Thirty-four games were conventionally televised in the market last season and only thirty-two will be televised in the current season. The twenty games otherwise available for subscription exhibition during the current season must be reduced in proportion to the reduction in the number of games conventionally televised, a reduction of twenty percent in this case. Therefore, only sixteen games will be available for subscription exhibition in the current season. Of course, there may be many cases where the number of games televised is voluntarily reduced by a conventional television station for reasons completely unrelated to program siphoning. Upon a proper showing that this is the case, we will be disposed to grant a waiver of the proportional reduction provision.

201. As we pointed out in paragraph 195, *supra*, new teams which result from the restructuring of existing sports must be treated in a

special manner. With no previously established pattern of telecasts in the market, the first season games played by a new or transferred team in an existing sports league are not susceptible to allocation between conventional and subscription television pursuant to our formulae set forth above. Therefore, we must substitute an alternate telecast history for such new teams which can be applied by our rules in lieu of an actual telecast history. We have decided that the average of all telecasts, by category, of games played by teams in the league of the new team will provide a reasonable basis for allocating events between conventional and subscription television during the team's initial seasons of play. During the new team's first season of play, subscription exhibition of its games will be determined from the previous season's average of telecasts in the category of all events played in the league. In the second season of play, subscription exhibitions will be determined from either the league average of telecasts which was used the previous season, or the previous season's actual telecasts of games played by the new team, depending upon which figure represents the highwater mark in the category. This procedure will continue through the new team's fifth season of play, using the highwater mark of actual telecasts and the league average figure applied the first season to determine allowable subscription exhibitions. In the sixth season, subscription exhibitions will be determined by the highwater mark of actual telecasts during the previous five seasons in the same manner as for the older teams in the league.

202. The dichotomous nature of our non-specific events rule reflects what we perceive to be different public interest considerations attached to events which have been regularly televised and those which have not. The public is most interested in the continuation of conventional television coverage of events regularly televised in previous years, and less interested in the telecasting of those events which have received only intermittent coverage. The existing sports rule seeks to give effect to this distinction, but in the process of applying the rule, considerable confusion has resulted because of the many subjective responses which may be given to the question of whether events have been "regularly" televised. Our new rule continues to distinguish between events regularly televised and those not regularly televised, and also establishes a definite standard for making the distinction. The new rule permits the subscription exhibition of all remainder games where the category of events in question has not received substantial conventional television coverage, and only half of the remainder games where the category of events has received substantial coverage. The remainder games not made available for subscription exhibition allow for expanded conventional telecasts of those events which have been most often televised in the past and which, presumedly, the public has the greatest interest in viewing. This rule, we believe, provides for reasonable subscription exhibition of sports events without diminishing the public's opportunities to view events on conventional television.

203. We have established twenty-five percent as the watershed between a substantial and an insubstantial number of telecasts. Twenty-five percent is no magic number, but rather a reasonable figure to distinguish between a substantial number and an insubstantial number of events. Some pre-determined figure is necessary for the administration of our sports rules. Because of the more or less arbitrary

nature of the twenty-five percent figure, we intend to apply the rules flexibly in certain situations. Consider this hypothetical: A conventional independent television station historically has telecast approximately twenty percent of the Yankee away baseball games in its market. Last season a television network affiliate in the same market telecast one Yankee away game as a network game of the week which resulted in more than twenty-five percent of the Yankee away games having been telecast in the market last season. Should this happenstance severely diminish the Yankee away games available for pay exhibition during the next five seasons? Possibly not. Therefore, presented with situations similar to our hypothetical and where the public interest would not suffer, we will consider granting waivers to permit the subscription exhibition of more events than would be permitted by a strict application of our rules.

204. It has been alleged that any rule which permits the subscription exhibition of remainder games will result in the best events, in terms of popularity, location and time of occurrence, being purchased for subscription exhibition, leaving the less attractive events for conventional exhibition. To guard against this eventuality, we have considered allowing conventional broadcast stations and networks to preempt certain events which they would like to carry. We would permit conventional television to choose the events it wishes to televise and preclude these events from being exhibited on a subscription basis.

205. Having studied the merits of this proposal, we have concluded that a preemption provision would add unwarranted complexity to the rules and might produce anomalous results. Therefore, at least for the present, we have decided not to include such a provision in our rules. We are nonetheless concerned that the quality of events offered to conventional television might be reduced. Should this happen, we might be required to include the concept of preemption in the rules. For the present, we will trust in the good faith of the parties involved to conduct their operations in accordance with the spirit as well as the letter of the rules.

206. One final matter with regard to sports events must be discussed. We have been advised that some sports teams pay for local television coverage of away games in order to gain media exposure and promote attendance at home games. It is submitted that the anti-siphoning rules are not meant to reserve events for conventional television at the expense of the sport promoter, and that events televised in whole or in part at the expense of the local team should not be figured into the anti-siphoning formulae.

207. This example points out potential problems which will be encountered as the anti-siphoning rules are applied in real-life situations. Although solutions to anticipated problems such as this might be incorporated into the rules, every potential problem cannot be provided for in advance without rendering the rules unduly complicated. Therefore, we will leave problems such as that mentioned above for resolution by the Commission on an *ad hoc* basis. As we have repeatedly stated during the course of this discussion, we intend to closely monitor the operation of the rules and we expect to grant waivers in appropriate circumstances. We believe that the new sports rules clear up many of the ambiguities present in the existing rules, but some problem areas remain. The rules have been drafted for general application and they

are unavoidably imprecise in several areas. We have not sought to define all of our terms with absolute specificity, for to do so would build in rigidity which would be incompatible with the unsettled environment in which the sports rules must operate. We intend that the rules be administered flexibly, but in a manner consistent with their purpose. If necessary, we will resolve uncertainties and make adjustments in later actions. By this policy, we hope to maximize the amount of sports programming made available to the public by both conventional and subscription services.

208. The foregoing paragraphs set out the manner in which the terms "sports events," "new sports events," "specific events," "nonspecific events," "live telecast" and "category" will be construed. Additionally, the legislative history contained in the *Fourth Report and Order in Docket 11279*, and the *Report and Order in Docket 18893*, unless modified herein, will be given effect in our administration of the new sports rules.

Series Type Programs

209. The comments filed in this proceeding evidence a striking paucity of information with respect to series type programs. The comments which address the issue at all generally fall within two categories—those urging retention of the existing rule, and those urging its deletion. The evidence in favor of retention is sparse, and proponents of the opposite point of view argue that this very lack of evidence is sufficient grounds for the Commission to reach a decision to delete the series rule.

210. There is considerable agreement that the proscription contained in the existing rule is overly broad. ABC, one of the few parties taking an intermediate position between retention and deletion of the series rule, states in its comments that the present rule discourages the presentation of new and innovative programming on subscription operations, and suggests that the rule might be modified without creating a substantial risk of siphoning programs from conventional television. The testimony of representatives of The Motion Picture Association of America, Inc., indicates the existence of a large quantity of unused talent and production capacity which could produce series programming for subscription exhibition without affecting the availability of such programming to conventional television. This evidence suggests that, at the very least, subscription interests should be able to exhibit series programs produced especially for the subscription market, and that perhaps restrictions on series programs are not required to prevent siphoning.

211. Based on the sparse record before us, we are reluctant to either delete or engage in a wholesale revision of the present series rule. Series programs constitute a large portion of conventional television programming, and any step which might affect the continued availability of that programming to conventional television viewers should not be taken lightly. Therefore, we will not now revise the rule beyond allowing for the subscription exhibition of any new series, no episode of which has been exhibited on conventional television. To determine whether restrictions are needed with regard to series previously shown over conventional television, and, if so, what form they should take, we

have invited additional comments on the series question in a *Second Further Notice of Proposed Rule Making in Docket 19554*,[58] issued concurrently with this *First Report*. The limited action which we have taken today does not represent a final determination of the series issue, and additional action will be taken if called for on the basis of our continuing inquiry into the matter.

Ninety Percent and Advertising Rules

212. The present rules prohibit subscription operations from devoting more than ninety percent of their subscription programming hours to feature films and sports combined. We believe that this provision has been successful in encouraging diverse and innovative programming such as that now provided on many subscription cable television channels. Therefore, we will retain the ninety percent provision, but will not increase it. We believe that feature films and sports will continue to be the staples of subscription operations and that rules requiring a substantial decrease in the amount of this programming would result in "a harshness that could spell the death knell of STV before it even began."[59]

213. Existing rules, both as to over-the-air STV and subscription cable operations, prohibit the presentation of commercial advertising other than for promotions of other subscription programs. Retention of these rules, which were initially adopted to assure that subscription operations provided a different and diverse type of programming from that found on advertiser supported television, has produced little dissent and we see no reason not to retain our original view that such restrictions on the presentation of commercial advertising are desirable. We do note the oral argument testimony of Mr. Laird Kelly, Director of Community Medical Cablecasting, an organization which offers continuing medical educational programming to practicing physicians. Mr. Kelly stated that distribution of this high cost programming would be facilitated if its support were to be shared by a combination of commercial advertisers and subscribers rather than only one or the other.[60] It is not our intention, in retaining the advertising limitation, to preclude the presentation of specialized programming of this type. However, based on the comments received in the course of this proceeding, we believe the type of programming referred to by Mr. Kelly to be sufficiently unique that it is better dealt with on an *ad hoc* special relief basis than by attempting to fashion an exemption to the general rule.

Application of Rules to Leased Channel Programming

214. In the initial *Notice* in this proceeding, we asked the following questions:

> Are the rules appropriate for and how should they be administered with respect to access and leased channel cablecasting for which there is a per-program or per-channel charge and not subject to the control of the cable television operator? 't paragraph 12.

Although in the filings received there was little comment on this matter, it requires resolution. Insofar as our concern is with the impact that subscription television operations will have on conventional over-

[58] FCC 75-370, 40 Fed. Reg. ——.
[59] *Fourth Report and Order in Docket 11279*, *supra* note 4, at 564.
[60] Transcript of oral argument in Docket 19554, Vol. 4, pp. 640–644.

the-air broadcasting, our concern extends equally to programming distributed by a cable system operator himself or to that which another entrepreneur distributes over his facilities on a leased channel basis. Like rules must logically apply to each.

215. In administering these rules, at least two alternatives are open to us. We can charge the cable operator with assuring his own compliance and that of others using his facilities or we can ourselves look directly only to that individual or entity exercising "editorial" control over the programming, be it system operator or channel lessee. While the existing rules on the subject are not altogether clear, having been adopted prior to our leased channel requirements, we have, on at least one occasion, looked to the entity exercising direct content control for compliance with our rules. See letter dated September 17, 1974 to Home Box Office, Inc. concerning carriage of Yankee baseball games. Because our authority to regulate the content of subscription programming appears to fall squarely within the bounds of *U.S. v. Southwestern Cable Co.*, 392 U.S. 157 (1968), as "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting," we see no jurisdictional bar to looking directly to channel lessees for compliance. Further, direct application of the rules is fairer to all involved and likely to be more effective in achieving compliance because the entity making the programming choices must do so with knowledge that he, rather than the cable operator whose facilities he uses, will be held accountable for compliance with the rules. We have accordingly drafted the rules that we have adopted to make clear that both channel lessees and cable system operators are subject to their requirements.

Preemption of Local Regulation of Subscription Television Operations

216. As a final matter, we note that a number of cable television franchises contain provisions purporting to regulate subscription cable television or to ban the service entirely. We have specifically stated that ". . . the Commission has preempted the field of pay television cablecasting so that local franchise terms [purporting to regulate subscription cablecasting] are inoperative. . ."[61] In paragraph 130 of the *Cable Television Report and Order*, the Commission stated:

> . . . it is this Commission that must make the decisions as to conditions to be imposed on the operation of pay cable channels, and we have already taken steps in that direction. (See Section 76.225). Federal regulation is thus clearly called for.[62]

217. Although we have not ourselves undertaken the regulation of rates for the sale of subscription programming, we regard our prior statements concerning the regulation of subscription operations as preempting local regulation of rates as well as program content. We do not believe that regulation of subscription rates is either practicable or necessary at this time. The competitive alternatives to subscription television are plentiful, including most particularly free television, motion picture theatres, live sports, and other entertain-

[61] *Time-Life Broadcast, Inc.*, FCC 71-946, 31 FCC 2d 747 (1971).
[62] FCC 72-108, 36 FCC 2d 143, 193 (1972). *See also, Clarification of Rules and Notice of Proposed Rulemaking*, FCC 74-384, 46 FCC 2d 175, 186 (1974).

ment events. As we said with respect to over-the-air subscription rates:

> The public is free to subscribe or not to subscribe to STV services. We believe that the marketplace will regulate the charges that are paid and that if they are excessive, the operations will not succeed . . ."[8]

In any case, we believe that the complex nature of subscription cablecasting and broadcasting, with implications not coincident with state boundaries, dictates that its regulation emanate from a single source, and that determinations as to when and how to regulate the service must be made at the federal level.

Rule Making Proceeding to Remain Open

218. Our action today is the result of some twenty years of study and consideration during which time every aspect of subscription television and its possible effects upon the conventional broadcast structure has been scrutinized and debated. The rules we have adopted here mark our second major attempt to design a regulatory program to ensure that the public's access to programming now delivered by conventional television is not diminished by subscription operations. We very clearly recognize, however, that, in a complex matter such as this, there may be gaps which remain to be filled or particular provisions that need to be refined. In some areas we have expressed our concerns but chosen not to adopt rules until further experience provides a better indication of their need and direction. With respect to series programming, we have explicitly sought further comment. We are concerned that not merely the letter of our rules but their spirit be carried out and believe it appropriate to continue to keep a careful watch on developments to be sure that this occurs. We have thus denominated this document as a *First Report and Order* in this proceeding and are leaving the proceeding open to be a repository for comments on how the rules operate and whether they achieve their intended goals, and to facilitate our taking prompt further action should that become necessary. For now, we are convinced that our rules reflect a fair and reasonable effort to provide for the orderly development of subscription television while preserving for the public the benefits now derived from the conventional broadcast structure.

Authority for adoption of the rules herein is contained in Sections 2, 4(i) and (j), 303, 307, 308, and 309 of the Communications Act of 1934, as amended.

Accordingly, IT IS ORDERED, That effective May 27, 1975, Parts 73 and 76 of the Commission's Rules and Regulations ARE AMENDED as set forth in the attached Appendix A.

IT IS FURTHER ORDERED, That the proceeding in Docket 18893 IS TERMINATED.

IT IS FURTHER ORDERED, That the proceeding in Docket 19554 is retained open.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

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[8] *Fourth Report and Order in Docket 11279, supra* note 4 at 548.

APPENDIX A

Parts 73 and 76 of Chapter I of Title 47 of the Code of Federal Regulations are amended as follows:

PART 73—RADIO BROADCAST SERVICE

1. Section 73.643 is revised to read as follows:

§ 73.643 GENERAL OPERATING REQUIREMENTS.

Subscription television broadcast programming shall comply with the following requirements:

(a) Feature films shall not be broadcast except as provided in this paragraph.

(1) A feature film may be broadcast if——

(i) The film has been in general release in theaters anywhere in the United States for three (3) years or less prior to its proposed broadcast;

(ii) A conventional television broadcast station licensed in the market of the subscription television broadcast station holds a present contractual right to exhibit the film. For purposes of this subdivision, a television station affiliated with a television network will be deemed to hold a present contractual right to exhibit a film if the network to which it is affiliated holds such a right;

NOTE.—The manner in which the term "present contractual right" will be construed is explained in paragraphs 169 and 170, *First Report and Order in Docket 19554*, FCC 75-369, 40 Fed. Reg. ——.

(iii) The film has been in general release in theaters anywhere in the United States for more than ten (10) years prior to its proposed subscription broadcast and the film has not been exhibited over conventional television in the market of the subscription television broadcast station for three (3) years prior to its proposed subscription broadcast. Once a film has been broadcast in the market pursuant to this subdivision or cablecast on a subscription basis pursuant to § 76.225(a)(1)(iii), such film may thereafter be broadcast on a subscription basis in the market without regard to its subsequent exhibition over conventional television;

(iv) The film is in a foreign language;

(2) Feature films otherwise excluded by this paragraph may be broadcast upon a convincing showing to the Commission that they are not desired for exhibition over conventional television in the market or that the owners of the broadcast rights to the films, even absent the existence of subscription television, would not make the films available to conventional television.

(3) Every subscription television broadcast station over which a feature film is broadcast pursuant to this paragraph shall maintain for public inspection a file listing the title of the film, the date on which it was broadcast and the provision of this paragraph pursuant to which it was broadcast. When a feature film is broadcast pursuant to subdivision (1)(ii) of this paragraph, the station or network, serving the market and holding a present contractual right to exhibit the film shall be specified. These files shall be retained for a period of two years.

(b) Sports events shall not be broadcast live except as provided in this paragraph.

(1) A specific event may be broadcast if the event has not been broadcast live over conventional television in the market of the subscription television broadcast station during any one of the five (5) seasons preceeding the proposed subscription broadcast. If a regularly recurring event takes place at intervals of more than one year (*e.g.*, summer Olympic games), the event shall not be broadcast on a subscription basis if it has been broadcast live over conventional television in the market of the subscription television broadcast station during any one of the ten (10) years preceeding the proposed subscription broadcast.

(2) New specific sports events that result from the restructuring of existing sports shall not be broadcast on a subscription basis until five (5) seasons after their first occurrence. Thereafter, subscription broadcasts shall be governed by subparagraph (b)(1).

(3) The number of non-specific events which may be broadcast on a subscription basis in any given season shall be determined as follows:

(i) If less than twenty-five (25) percent of the events in a category of non-specific events were broadcast live over conventional television in the market of the subscription television broadcast station during each of the five (5) seasons preceeding the proposed subscription broadcast, the number of events in the category broadcast on a subscription basis shall not exceed the number of events in the category not conventionally broadcast in that season among the preceeding five (5) seasons when the largest number of events in the category were broadcast over conventional television.

(ii) If twenty-five (25) percent or more of the events in a category of non-specific events were broadcast live over conventional television in the market of the subscription television broadcast station during any one of the five (5) seasons preceeding the proposed subscription broadcast, the number of events in the category broadcast on a subscription basis shall not exceed fifty (50) percent of the number of events in the category not broadcast in that season among the preceeding five (5) seasons when the largest number of events in the category were broadcast over conventional television. However, if the number of events in the category to be broadcast over conventional television in the current season is a reduction from the number of events broadcast in that season among the preceeding five (5) seasons when the largest number of events in the category were broadcast, the number of events in the category which may be broadcast on a subscription basis pursuant to this subparagraph shall be reduced in proportion to the reduction in events broadcast over conventional television.

NOTE.—The manner in which this paragraph will be administered and in which "sports events," "new sports events," "specific events," "non-specific events," "live telecast" and "category" will be construed is explained in paragraphs 186–208 of the *First Report and Order in Docket 19554*, FCC 75–369, 40 Fed. Reg. ——.

(c) No series type of program with interconnected plot or substantially the same cast of principal characters, any episode of which has been broadcast over conventional television, shall be broadcast.

(d) No commercial advertising announcements shall be carried during subscription television operations except for promotion of subscription television broadcast programs before and after such programs.

(e) Not more than 90 percent of the total subscription programming hours shall consist of feature films and sports events combined. The percentage calculations may be made on a yearly basis, but, absent a showing of good cause, the percentage of such programming hours may not exceed 95 percent of the total subscription programming hours in any calendar month.

(f) Any television broadcast station licensee or permittee authorized to broadcast subscription programs shall broadcast in addition to its subscription broadcasts, at least the minimum hours of nonsubscription programming required by § 73.651.

(g) Except as they may be otherwise waived by the Commission in authorizations issued hereunder, the rules and policies applicable to regular television broadcast stations are applicable to subscription television operations.

NOTE.—As referred to in this section, "the market" of a subscription broadcast station includes all commercial broadcast stations which place a Grade A contour over the entire community to which the subscription station is licensed.

PART 76—CABLE TELEVISION SERVICE

2. Section 76.225 is revised to read as follows:

§ 76.225 SUBSCRIPTION CABLECASTING.

Cable television system operators or channel lessees engaging in origination or access cablecasting operations for which a per-program or per channel charge is made shall comply with the following requirements:

(a) Feature films shall not be cablecast by a cable television system subject to the mandatory signal carriage requirements of Subpart D of Part 76, except as provided in this paragraph.

(1) A feature film may be cablecast if—

(i) The film has been in general release in theaters anywhere in the United States for three (3) years or less prior to its proposed cablecast;

(ii) A conventional television broadcast station licensed in the market of the cable television system holds a present contractual right to exhibit the film. For purposes of this subdivision, a television station affiliated with a television network will be deemed to hold a present contractual right to exhibit a film if the network to which it is affiliated holds such a right;

NOTE.—The manner in which the term "present contractual right" will be construed is explained in paragraphs 169 and 170, *First Report and Order in Docket 19554*, FCC 75–369, 40 Fed. Reg. ——.

(iii) The film has been in general release in theaters anywhere in the United States for more than ten (10) years prior to its proposed cablecast and the film has not been exhibited in the market of the cable television system over conventional television for three (3) years prior to its proposed cablecast. Once a film has been cablecast in the market pursuant to this subdivision, or broadcast on a subscription basis pursuant to § 73.643(a) (1) (iii), such film may thereafter be cablecast in the market without regard to its subsequent exhibition over conventional television;

(iv) The film is in a foreign language;

(2) Feature films otherwise excluded by this paragraph may be cablecast upon a convincing showing to the Commission that they are not desired for exhibition over conventional television in the market of the cable television system, or that the owners of the broadcast rights to the films, even absent the existence of subscription television, would not make the films available to conventional television.

(3) Every cable television system over which a feature film is cablecast pursuant to this paragraph shall maintain for public inspection a file listing the title of the firm, the date on which it was cablecast and the provision of this paragraph pursuant to which it was cablecast. When a feature film is cablecast pursuant to subdivision (1)(ii) of this paragraph, the station or network serving the market and holding a present contractual right to exhibit the film shall be specified. These files shall be retained for a period of two years.

(b) Sports events shall not be cablecast live by a cable television system subject to the mandatory signal carriage requirements of Subpart D of Part 76, except as provided in this paragraph.

(1) A specific event may be cablecast if the event has not been broadcast live over conventional television in the market of the cable television system during any one of the five (5) seasons preceding the proposed cablecast. If a regularly recurring event takes place at intervals of more than one year (*e.g.*, summer Olympic games), the event shall not be cablecast if it has been broadcast live over conventional television in the market during any one of the ten (10) years preceding the proposed cablecast.

(2) New specific sports events that result from the restructuring of existing sports shall not be cablecast until five (5) seasons after their first occurrence. Thereafter, subscription cablecasts shall be governed by subparagraph (b)(1).

(3) The number of non-specific events which may be cablecast in any given season shall be determined as follows:

(i) If less than twenty-five (25) percent of the events in a category of non-specific events were broadcast live over conventional television in the market of the cable television system during each of the five (5) seasons preceding the proposed cablecast, the number of events in the category cablecast shall not exceed the number of events in the category not broadcast in that season among the preceding five (5) seasons when the largest number of events in the category were broadcast.

(ii) If twenty-five (25) percent or more of the events in a category of non specific events were broadcast live over conventional television in the market of the cable television system during any one of the five (5) seasons preceding the proposed cablecast, the number of events in the category cablecast shall not exceed fifty (50) percent of the number of events in the category not broadcast in that season among the pre-

ceding five (5) seasons when the largest number of events in the category were broadcast. However, if the number of events in the category to be broadcast in the current season is a reduction from the number of events broadcast in that season among the preceding five (5) seasons when the largest number of events in the category were broadcast, the number of events in the category which may be cablecast pursuant to this subparagraph shall be reduced in proportion to the reduction in events broadcast.

NOTE.—The manner in which this paragraph will be administered and in which "sports events," "new sports events," "specific events," "non-specific events," "live telecast," and "category" will be construed is explained in paragraphs 186–208 of the *First Report and Order in Docket 19554*, FCC 75–369, 40 Fed. Reg. ——.

(c) No series type of program with interconnected plot or substantially the same cast of principal characters, any episode of which has been broadcast over conventional television, shall be cablecast by a cable television system subject to the mandatory signal carriage requirements of Subpart D of Part 76.

(d) Not more than ninety (90) percent of the total cablecast programming hours shall consist of feature films and sports events combined. The percentage calculations may be made on a yearly basis, but absent a showing of good cause, the percentage of such programming hours may not exceed ninety-five (95) percent of the total cablecast programming hours in any calendar month.

(e) No commercial advertising announcements shall be carried on subscription channels during such operations except before and after such programs for promotion of other programs for which a per-program or per-channel charge is made.

NOTE.—As referred to in this section, "the market" of a cable television system includes all commercial broadcast stations which must be carried by the cable television system upon request pursuant to Subpart D of Part 76.

STATEMENT OF COMMISSIONER GLEN O. ROBINSON DISSENTING IN PART AND CONCURRING IN PART

I concur with the Commission's decision insofar as it concludes that some restriction on pay carriage of sports events is appropriate (though the rules adopted are more complex and somewhat restrictive than I would prefer). In all other respects, I dissent.

I. INTRODUCTION

At the outset it is necessary to state my basic approach to the problem which is generally at odds with the approach which the Commission has embraced.[1] The Commission has attempted to find the public interest somewhere between the conflicting claims of broadcasters and pay cable entrepreneurs. In doing so it has strayed from what should be the sole concern here: preventing the "siphoning" of programming from "free" television to "pay" television, and instead attempted to protect free broadcasting from the competition of pay broadcasting. It is in fact apparent that the term "siphoning" is not the main source of objection to broadcasters; in fact, the chief source of their discontent is not that they will be deprived of programming, but that they will have to endure greater competition for audiences from cable systems offering subscription program fare. However, the broadcasters' right to be sheltered from such competition, as I shall explain more fully below, is not—on the record which has been made at least—entitled to our concern; our concern is the public's interest in not being deprived of programming which it wants to see. Where

[1] As the central concern of this proceeding has been pay-cable, my opinion is focused primarily on pay cable, but my critique, like the Commission's rules, is applicable to over-the-air STV as well as pay cable.

there is no realistic probability of that deprivation occurring, there is no basis for our interfering with the ordinary course of competition.

The present restrictions on pay cable command unusually close scrutiny. They are so obviously protectionist in character as to require, *in limine*, an explanation how they can be squared with the policy of competition. The basic argument, purged of the ingenious filigree with which some advocates endow it, is this:

(1) The FCC has a broad jurisdiction to regulate pay television, including pay cable, and a proper concern over the impact of pay television on the continued availability of free television.

(2) Pay television threatens advertiser-supported ("free") television because it has the potential to divert ("siphon") programming away from the latter. This phenomenon results from the supposed ability of pay cable to outbid broadcasters (advertisers) for exclusive rights to air programs. This supposed ability derives from the assumption that, at some level of program or service charge,[2] the pay subscribers will value the right to view programming without commercials more than advertisers value the right to show it with commercials. Thus, some types of programming may no longer be available (a) to persons who do not have access to pay television,[3] (b) to persons who cannot pay; and (c) to persons who will not pay.

(3) To prevent such siphoning, it is necessary either to (a) ban all pay operations, or (b) prohibit the carriage of certain types of programming on cable where the programming is susceptible to such siphoning.

That the FCC has jurisdiction to take cognizance of these matters, and to frame remedial rules with respect to them, may be conceded, for purposes of this discussion. See *National Association of Theatre Owners v. FCC*, 420 F.2d 194 (D.C. Cir. 1969), *cert. denied*, 297 U.S. 92 (1970);[4] *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968); *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972). Likewise, it may be conceded that antisiphoning rules of various kinds may be entirely appropriate—assuming, of course, that this underlying evil is reasonably made to seem a significant threat.[5] But the exist-

[2] Included herein is the possibility of charging on a period or on a general service basis, as well as the possibility of a per-program charge.

[3] This argument, of course, is directed at pay cable with its limited nationwide penetration. Inasmuch as cable seems to provide the only viable mode for pay operations, R. Noll, M. Peck and J. McGowan, *Economic Aspects of Television Regulation*, 140 (1973), I think we can assume this limitation on access to be at present a significant problem.

[4] Because the *NATO* case involved over-the-air subscription television and hence rested in part on spectrum scarcity considerations which are not applicable to cable, it is by no means dispositive of the legality of pay cable restrictions. However, read in conjunction with *Southwestern Cable*, I would concede that *NATO* is pertinent, though not dispositive, authority for pay cable regulation on the general rationale that it is part of the overall scheme of protecting free broadcast service.

[5] If all the nation's households that presently have access to over-the-air television had equal access to pay television (as noted earlier, this means as a practical matter pay cable), it would be questionable whether the FCC should have restrictions which preclude pay cable from outbidding advertisers for programming. In such a situation, the social benefits of "free" television (for a brief theoretical view, see Samuelson, *Public Goods and Subscription TV: Correction of the Record*, 7 J. Law & Econ. 81 (1964)) would have to be weighed against the benefits of a pay television system (principally its ability to reflect consumer preferences more accurately, see Minasian, *Television Pricing and the Theory of Public Goods*, 7 J. Law & Econ. 71 (1964). See generally, R. Noll, M. Peck and J. McGowan, *supra*, at 130–36.) However, there is no need to address this issue here. For the present, it is enough to say that the Commission should not permit programming from free over-the-air television to be entirely diverted to pay cable television, because in the present circumstances this would make such programming unavailable to much of the market. In other words, given the fact that only about 15 percent of the nation's households have access to cable, any substantial diversion of programming to pay cable means that it is unavailable to all those who do not have physical access to cable—the majority of the nation's households.

ence of a general regulatory jurisdiction does not tell us what our regulations ought to be. My analysis assumes that the basic aim of regulation here, as stated in our *Fourth Report and Order on Subscription Television*, 15 FCC 2d 466 (1968) is to protect against siphoning of programming from free television to pay television.[6] I do not think we ought to exercise our broad powers, as I think the majority has done, simply to protect broadcast stations against competition. Admittedly, reasonable restrictions designed to protect against siphoning will incidentally restrain competition. But even if the purpose of the rule is thought to justify the restraint, the restraint must nevertheless be reckoned a cost, not a benefit, of the rule. To the extent that the rules do not serve the proper aim of guarding against siphoning, the competitive restraint is contrary to national communications policy favoring competition,[7] and it is against the public interest. More than that, because it is not finely tuned to achieve a proper purpose, this restraint also raises serious First Amendment problems. See, *e.g.*, *Shelton v. Tucker*,

[6] A number of additional restrictions were imposed on over-the-air subscription television (STV) that are not related to the siphoning problem. In essence these are: (1) STV stations may be established only in communities within the Grade A contour of at least five commercial stations (including the STV station); and (2) only one STV station may be established in a community; (3) each STV station must broadcast at least 28 hours per week of free programming; (4) no commercial advertising may be carried during subscription operation; (5) no more than 90 percent of the subscription programming may be composed of feature film and sports. 47 C.F.R. 73.642.) (Certain technical standards on STV operations were also imposed by the Commission's *Fifth Report and Order*, 19 FCC 2d 559 (1969); 47 C.F.R. 73.643.)

Rules (4) and (5) were subsequently applied to pay cable, along with the antisiphoning rules, in 1970. *CATV*, 23 FCC 2d 825 (1970). Although these rules have received virtually no attention in this present case, they are still properly before us inasmuch as this proceeding purports to be a general re-examination of pay television rules; this is, therefore, an appropriate occasion to express my opposition to the restrictions on advertising and the limitation on sports and film carriage, as they are applied both to broadcast STV and pay cable.

Advertising. I oppose the restriction on advertising because it serves no purpose other than the reduction of competition in the advertising market. It is not clear what purpose is sought to be served by this restriction. The majority opinion speaks vaguely of assuring a "different and diverse type of programming" while *The Fourth Report* explains only that STV is different than free television, and that STV, without advertising, offers the special advantage that it maintains the "artistic continuity," of a program. 15 FCC 2d at 565. As to the diversity of programming rationale, it is enough to say that the connection between diversity and the ban on advertising is nowhere established. As to assuring "artistic continuity," this is not a proper function of the Federal Communications Commission. Insofar as the restriction may also be grounded upon some notion that viewers will be "victimized" by a double charge—advertising messages and a subscription fee—it is quite unnecessary. If viewers prefer to pay a sufficient premium for uninterrupted subscription programs to offset implicit loss of advertising revenue, so be it; but if viewers would prefer to accept some advertising interruptions in return for lower subscription fees, I see no reason why we should prevent them from exercising such a choice. I dare say that most of my colleagues exercise such a choice daily in their reading of the *New York Times* and the *Washington Post*. Few avail themselves of the *Christian Science Monitor* despite its very limited advertising clutter. Finally, I note the possibility that the decision to limit pay-cable advertising may have been conceived in part to protect broadcasters from competition in the advertising market; since no such rationale is given here, I ascribe it to the Commission—though it is not consistent with some of the other pay television restrictions. Such a consideration, of course, would be inconsistent with the policy expressed in Docket 18110, limiting cross ownership of media in order to prevent the exercise of monopoly power. *Multiple Ownership Rules*, —— FCC 2d ——, FCC 75–104 (1975).

Program Limits. As for the restrictions limiting the amount of film and sports programming, this, I think, is not merely an unnecessary interference with viewer choice, it is, at least as applied to cable, also an unconstitutional one as well. I am aware that this same restriction was sustained in the *NATO* case, dealing with over-the-air STV. However, even if one assumes that such direct commandments concerning programming are constitutional when applied to broadcasting, involving as it does the use of scarce spectrum. (See *National Association of Theatre Owners, supra; Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969), that would not suffice to sustain such a regulation in the case of cable. *Cf., Miami Herald Publish. Co. v. Tornillo*, 94 S. Ct. 2831 (1974).

[7] Though competition is not the unbending test of the public interest, convenience or necessity mandated by the Communications Act, it is a very important component of it. *United States* v. *RCA*, 358 U.S. 334, 351–52 (1959). Indeed in radio and television, competition is presumptively the preferred policy, a policy to be affirmatively promoted absent a clear showing of contrary public need. *E.g., FCC* v. *Sanders Bros.*, 309 U.S. 470 (1940); *Multiple Ownership Rules*, —— FCC 2d —— FCC 75–104 (1975). I see no such showing of contrary public need here except in the instance where there is a real danger of program siphoning.

364 U.S. 478, 488 (1960) (laws affecting First Amendment freedoms, even though legitimate in purpose, must pursue their aim by the "least restrictive means"); *NAACP v. Button*, 371 U.S. 432, 433 (1963) ("government may regulate in the area of free speech only with narrow specificity").

Keeping the foregoing matters in mind, the siphoning phenomenon must be analyzed carefully as it relates to the three classes of programming which have been distinctively identified for this purpose in our rules: feature film, series, and sports. In short, we must take not one "hard look" (see *WAIT Radio v. FCC*, 418 F. 2d 1153, 1157 (D.C. Cir. 1969)), but three.

II. FEATURE FILM

The newly-adopted rules concerning the exhibition of feature films improve upon their predecessors. They give pay operators an extra year, from the time of a motion picture's first general release, to use the film; they allow pay operators to bargain for the rights to any film which is already under license for free broadcasting; and they expand the number of "old" films to which pay operators have access. These changes in our policy will make some difference to the pay television industry, but to me they are still arbitrary and unnecessarily harsh.

The arbitrariness of the film rule is most sharply highlighted by the definition of the time period in which films may be carried in a pay mode—three years at one end, ten years at another, where the film has not been broadcast for three years. If there is a science in this, it is the science of numerology. What is the significance of three and ten? Well, of course, the number ten is important for it is precisely the number of fingers on a human's hands. The number three is similarly important to the three-fingered sloth.[8] This is a parody, and perhaps an unfair one. I concede that once one determines it is necessary to put some limits on carriage of film on pay television, any defined limits are likely to be somewhat arbitrary. However, this fact does not in itself justify the arbitrary limits chosen here; rather it raises the question: why must any limits be imposed? Are such limits necessary to protect broadcasting from siphoning of programs from free to pay television? I think not.

Far from being necessary to protect against siphoning, our rules will tend to cripple the natural economic advantage which pay television has over network television in the exploitation of copyrighted feature films. Nothing in the evidence before us justifies this hostility. The threat of pay television diverting filmed or taped programming away from commercial television is illusory. No doubt, if we had no inhibiting rules, some filmed entertainment would be distributed by pay mode before it was available for network use, but the time lag would be an insignificant loss to the public, while the benefits would be great (1) to the copyright owners of the films; (2) to the members of the public who are able and interested in paying for an early, home exhibition of a movie, and (3) to a broader segment of the cable subscribing public who would benefit from nonpay cable services which

[8] The number three also had deep philosophical significance for Hegel and his followers, and, of course, it has geographical importance to every schoolboy who knows that it is the number of parts into which Gaul is divided.

pay cable could help finance. The fact that there is a market for pay cable offerings of feature films is evidence that some people place a considerable value on early exposure to a contemporary film feature. As long as pay television does not significantly delay the "free" commercial television exhibition of these films, the benefits to viewers of pay service must outweigh its social cost. The only losses which would derive from the complete elimination of these antisiphoning rules would be the pecuniary losses of commercial broadcasters who would find their audiences reduced to some extent by the new competitive service and their filmed products somewhat more depreciated by previous exhibitions.[9] The Commission should not be reducing viewer choice (and therefore economic value) in this manner simply to maintain the level of broadcaster rents. This is a matter of internecine warfare between businessmen, which they can very satisfactorily resolve without our guidance.

It would be silly to say that networks "siphon" films away from local stations, or that theatres "siphon" films away from networks. Likewise, it seems to me unreasonable to maintain that pay cable would "siphon" films away from networks. The value of a copyrighted film is maximized by exhibiting it first in the market where it brings the highest price per viewer, and thereafter by successive release in lower-priced markets as its potential in higher-priced media is exhausted. I do not believe that this is the appropriate time to consider interfering with a copyright holder's right to effect this profit-maximizing progression. The real issue before us (at least with respect to this aspect of the new rules) is whether networks should be put to the rigor of increased competition for viewers.[10] I have heard no arguments in this proceeding that convince me we ought to deprive motion picture distributors of an orderly market in which to vend their wares, or to deprive American citizens of the right to spend their own money however it best pleases them to spend it.

In order to explain my rejection of the antisiphoning rule, as applied to feature films, it will be necessary to discuss the argument in some detail. (The analysis is applicable to any form of pay television but we can focus on cable since that is the real concern.) The scenario for film siphoning proceeds on the plausible assumption that a feature film will always be worth more to a given viewer as entertainment than it is to an advertiser as a selling medium. The American Broadcasting Company's submission of September 20, 1974, fairly representative of the proponents of this argument, urges that selective siphoning is possible in the immediate future. If only one half of the 8,000,000 cable subscribers (approximately the present number, nationwide) were willing to pay only 50 cents per month for, say, a "Thursday Night Movie" series consisting of 26 first-time network broadcasts and 26 "re-run" movies, these total revenues—$24 million per year—would almost equal the $24.33 million that ABC says is typical of its costs for such a series. If only a few more cable subscribers were added, or if the 50-cent figure were increased only slightly, commercial television would be outbid, and all those feature films would be siphoned away from the "free" TV audience. Or so the argument goes.

To my mind, this argument explains very little. Do theatres prevent television from getting motion pictures? Of course not. Motion pictures remain at theatres approximately as long as there are enough consumers willing to pay two dollars or more for the exhibitors to make a profit. After the theatrical exhibition is over, the films migrate to the next most profitable use that can be made of them. To the networks, the value of a typical film, or any prime time feature, is about three cents per viewer hour; that is the amount the film owner can expect to receive. However, the owner can expect to make about 25 cents per subscribing home on a pay-cablecast movie;[11] accordingly, one would expect that, following the end of its theatrical run but before its network television run, a motion picture feature would play on a pay basis. This migration from theatre to pay television to network is, as I stated earlier, economically sound, and I see no justification for us to interfere with it. I know of no reason to have rules that deprive film distributors from selling their property as their individual interests dictate. We are not dealing here with a great issue of social choice—compulsory education, for example—whose importance may justify overriding individual choice. All we are talking about here is the allocation of economic profit (more accurately, "rent"). Offhand, I am not aware that the networks need or deserve our powerful help in dealing with motion picture distributors. Why, therefore, do we intervene? As far as I can extrapolate from the many pleadings that purport to offer a rationale for our intervention, the argument is that if we did not intervene, we would add considerably to the lag between first release and network exhibition—a lag that already averages more than four years.

I reject this response. Pay exposure would not significantly delay the network exhibition of films. Pay television operators understand as well as networks (and other bsuinessmen) the economic advantages of coattails; the promotional value of the theatrical run of a film must be and (to the extent we allow such things to be) always is seized upon by the pay distributor. Pay cable exhibition always follows as closely as possible on the heels of the theatrical run of each film, which usually lasts less than a year. Furthermore, a motion picture on pay cable normally plays off in a very short period of time—

[9] It is not clear to what extent prior pay cable exposure would depreciate the value of a film feature for network use. There is evidence, however, suggesting that a single exposure of a film feature on commercial television diminishes its audience by only ten percent in its next showing. One may presume that the same holds true for pay exposure. See S. Beggs, *Exposure-Depreciation-Function Estimates for Network Movies 1961–1969*, Discussion Paper #63, Boston College Department of Economics, (Mar. 26, 1974).

[10] I cannot resist mentioning at this point that just two months ago, we issued the third version of the prime time access rule, whose chief purpose, according to the Commision's Report and Order, was to reduce "network dominance." I dissented in that matter because the prime time access rule seemed to me an ill-conceived and ineffectual way to accomplish that aim. I argued in my separate statement to encourage the spread of cable television—including, I especially noted, pay cable. Today's Report and Order may be taken either as a repudiation of that argument, or, more probably, as a tacit admission that the FCC is not really concerned with disturbing the economic power of the networks after all—or not much concerned, anyway. We seem to be saying that we hate network dominance enough to inflict penny-dreadful programs on people who, given a choice, would not watch them, but we do not hate network dominance enough to do anything that might have any significant effect on it. Students of public policy will be hard-put to reconcile these two results; students of anthropology, however, will discern a uniting theme. In today's decision, as in PTAR III, the Commission has unnecessarily interfered with a normal, orderly, cost-minimizing and profit-maximizing marketplace function—just the sort of processes that, one would suppose, would be thought most socially desirable. But for that perverse unity, the decisions are completely at loggerheads with one another.

[11] If competitive pay cable services are ever permitted to develop, one would expect this 25-cent figure to drop appreciably, but it is difficult to imagine that it would ever decline to the offer price now generally current at the networks—three cents per viewer home.

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a consequence, in part, of the way in which pay cable handles the exhibition of feature films.[12]

It is reasonable to suppose that the lag between theatrical exhibition and the commercial television exploitation of a film will probably increase in the near future. As the theatrical yield from films grows—due to contracting industry supply—the attractiveness of these films in second or third theatrical runs will grow in comparison with the paltry $750,000 to $800,000 which network television can offer. We cannot mandate an increase in theatrical feature film production, but we can allow those willing to pay for the privilege to see these films sooner on their home receivers by simply rescinding all pay-cable "antisiphoning" rules relating to feature films. There is no occasion for anguish that some households will act upon this privilege. Other things being equal, people have a right to spend their income according to their own estimate—and not our estimate—of what will bring them the most happiness.

The majority's decision to increase the 2/10-year period of protection to 3/10-years is, of course, an improvement; but it is a limited one. While most films would become eligible for pay cable exhibition before the ban period (between year 3 and year 10) because their theatrical exhibition value plays off in substantially less than three years, the most successful films—those that could be expected to form the heart of a pay cable entrepreneur's package—may not play out in three years. Such films may be best exploited by second or third release over a five or six-year period. Under our new rules, that sort of film might never find its way onto a pay cable.[13]

I concede, however, that the Commission's decision today does contain an aperture which lets some sunshine in on pay television. Our new rules do make it possible for a pay operator to show any film currently under contract to a network or local station. In spite of the complaints of some members of the pay cable industry that the broadcasters' habit of negotiating exclusive contracts makes this provision virtually meaningless, I believe they misconceive the economics involved. At present the commercial broadcasters purchase rights to feature films with exclusivity protection against all other commercial broadcasts in the same market for a period surrounding the date at which they are to be broadcast. This practice allows the broadcaster to make his plans confident that his ratings will not be blighted by a rival exhibition. It is an economically rational transaction in that the broadcasters, in buying this exclusivity, are buying three-cent viewer-hours away from other broadcasters who also value viewer-hours at three cents. The economic defensibility of a broadcaster purchasing exclusivity against a pay cable system, however, is dubious, at least as a general rule. Assuming, as common sense requires, that rational film distributors will exact a price equal to the opportunity cost of giving exclusivity to the broadcaster, then to buy exclusivity, the broadcaster would be buying protection for his three-cent viewer hours against viewer-hours worth 15 to 30 cents on the pay medium. The loss

[12] Each film is generally offered several times a day for a week or several weeks. Even the most enthusiastic subscriber has ample chance for satiation.

[13] Where the new rules do make an improvement, obviously, is in permitting pay cable to use those relatively successful films whose value for the theatrical exploitation lasts more than two years but plays off in less than three.

to the buyer would far outweigh any benefit. I doubt that a reasonable businessman could warrant such a transaction on economic grounds. One could not blame the Anti-trust Division of the Justice Department if it were to suspect predation.

Although I think the rules enacted today are better than those they replace, I do not wish to be understood as content with the new rules. The Commission has by no means come to terms with the economic properties—and their implications—of the pay medium. Pay television should be allowed, just as a first-run theater is allowed, to exploit its natural competitive advantage and to offer films before they are offered on commercial television. Our new rules will not permit this releasing pattern for the most successful films, and to that extent, I find them distasteful. But at least the pay operators will be allowed to offer these films concurrently with commercial broadcast exposure. To that extent, clearly these new rules constitute an improvement over the old.

III. SERIES

The treatment of filmed TV taped series on pay cable has received much less discussion than the motion picture issue and can be briefly dealt with. I disagree with the Commission's decision to retain restrictions on series (though I agree with the decision to modify the present rule to permit series origination).

In my judgment, the same arguments for total abolition of antisiphoning rules as are applicable in connection with feature films are equally applicable to the series programming issue. Indeed, the abolition argument here is even stronger, since there is no plausible prospect for siphoning of series programs in the foreseeable future. Even if pay systems were sufficiently widespread to begin their own programming efforts, there is no reason to believe that their program series woud be denied repeat exposure on commercial television. Major series could be produced for initial pay exposure, offered to commercial networks after their pay run, and finally distributed as syndication product. In fact, if pay television of any form ever spreads to a large percentage of the country's homes, this will be the general exploitation pattern, but it is not likely to develop in the near future. The series rules serve solely to preserve the syndication market for local broadcast stations. Protecting this interest (assuming, arguendo, that it is an interest worth protecting) in this way, to my mind, is overkill. Syndicated program series—off-network series or cheap talk shows—are likely to be of limited value to pay television. The best independent station is fortunate to achieve audiences of 10 to 12 percent of network audiences during prime time with this material. (See ARB, *Television Market Analysis* and ARB, *Syndicated Program Analysis*, periodic issues for evidence of this audience appeal.) Pay television could hardly thrive trying to sell what commercial television has trouble giving away free: I infer that it would not try. But if it does try, I can see no legitimate reason for us to hinder its efforts. As in the case of feature film, I see no likelihood that significant siphoning will take place. Again, it is true that pay television offering syndicated programming might increase competition for audience, but I reject that as a proper ground for our concern.

IV. SPORTS

The releasing pattern employed by feature-film distributors involves temporal price discrimination. In other words, if the consumer wants to see a movie sooner rather than later following its release date, he will, generally speaking, have to pay more money. Depending on how high a price each places on his eagerness to see a new film, one viewer will pay as much as $5 to see a film in its initial theatrical run while another will wait for the networks to contribute but three cents for the privilege of exposing him to the film. Pay television will simply replace the second-run or third-run in this pattern.

Other forms of entertainment should not be facilely assimilated to the feature film situation, however. Sports, space landings, or various contrived spectacles depreciate very rapidly once their outcome appears in the newspapers. While the difference in value between the first and second run of a feature film is not insignificant, between the first and second run of a football game the difference in value is enormous, the rerun generally bringing only a negligible fraction of the price of the original.

We have very little evidence on the willingness of viewers to pay for individual sporting events or even sports seasons on television, and most of what we have is deductive evidence. Most pay-cable experiments have had limited access to sports because of FCC restrictions. But what evidence we have does not suggest any widespread enthusiasm on the part of the public to pay much, at least for run-of-the-mill events. When one network is unavailable locally, it is to be expected that approximately 50 percent of television homes will generally subscribe to a cable television service at $60 to $72 per annum. To the extent that these viewers are buying a third network's sports as a part of this service, a portion of this subscriber fee should be attributed to sports offered by the network. With the enormous number of hours offered by the average commercial network each year, even full imputation of this $60 to $72 to sports does not translate into a high price per event.

Translating the potential for an individual sport on pay television is therefore quite difficult. If, for instance, NFL football were unavailable on commercial television, how much would viewers pay via pay cable for the service? Assume that half of those offered the service would pay $60 per year. After converter and distribution expense, this might net the NFL $30 per subscribing home per year. Under these most optimistic assumptions, pay cable would only have to be offered to four million subscribers before it would pay to deny football to commercial networks. If only $10 were to be realized per subscriber per year after all other costs, 12 million homes would have to be offered the service before it would be siphoned.

The foregoing speculation sounds plausible enough, but there is no room for confident prediction in this connection: the matter is made difficult by trying to estimate the effect of competition. If several sports were to withdraw from commercial television in favor of pay cable or other subscription television services, how much would viewers pay to see them? We simply do not know with any precision to what

extent the demand for athletic spectacles is cross-elastic among different sports.[14]

But it seems likely that football's pay cable royalties could not escape some diminution if baseball, hockey, basketball and other sports were vying for the same revenues.

Thus, the potential for siphoning in sports clearly exists. Even with current theater technology (which is obviously a quite primitive way to reach a public of paying customers when contrasted with a hypothetical mature pay television service), boxing events, canyon leaps and other splashy prodigies are sometimes siphoned from free television. Accordingly, I agree with the Commission that we should retain some restrictions on pay carriage of sports events.

However, the majority's limitation is more complex and somewhat more restrictive than seems to me necessary. In the case where 25 percent or more of a particular given category is carried on free television, pay television is limited to but 50 percent of the nonspecific events not broadcast during the previous five-year high water mark. I do not think that an adequate basis for distinguishing between free television carriage of less than 25 percent and 25 percent or more of nonspecific events has been shown. Such a limitation may leave to broadcast stations more games than they will offer. The only reason for depriving the pay subscribers of games which would not be broadcast in any event is to protect broadcasters, not from siphoning, but from audience competition.[15] And, as I pointed out earlier, merely protecting broadcasters from competition is not a proper use of FCC power. Pay television ought to be encouraged to offer sports during prime time. Television sporting events are, after all—it may come as a surprise to some people—minority programs. Generally, their appeal is not broad enough to give them a bright future as network evening fare.[16] There has been very little baseball or football offered by the networks during prime time viewing hours. Even if many very large sports markets, prime-time exposure of local teams is often sparse.

While sports events are usually dominated by feature films or series in prime-time ratings, their potential audiences are large enough and perhaps insensitive enough to price to support substantial pay carriage. It is just this sort of exposure which the Commission should be encouraging, for it would add substantially to the daily program diversity of television. However, given that commercial broadcasts and pay broadcasts of different games of the same sports teams are

[14] See, R. Panko, et al, *Assessment of the Demand for Pay Television Under Current And Alternative Regulations*, Stanford Research Institute, Study for OTP, p. 115–118, October 1974.

[15] To the extent that a person may not watch a Saturday afternoon baseball game on free TV because he saw a baseball game that previous Thursday night on pay cable, some competitive impact would exist. In the context of the nation's present cable plant, the impact would almost certainly be too small to measure unless the cross-elasticity between games on a given week (a phenomenon that undoubtedly exists; see R. Panko, et al, *Assessment of the Demand for Pay Television Under Current and Alternative Regulations*, Stanford Research Institute. Study for OTP, p. 115–118, October 1974)) were very much greater than seems to me likely.

[16] Only recently has ABC been successful in even mustering an average audience share for its prime time sports offering, Monday Night Football. It bears special emphasis that this program is only offered once per week. Hockey, basketball, golf, tennis, and other sports are rarely offered on the networks during prime time. These sports may obtain some local prime time coverage, but *usually* (not invariably, as is evident in the Washington, D.C. market) only on an independent station.

likely to be close substitutes for one another, we probably should require that pay television exposure, even of the lesser sports, bring about no reduction of commercial broadcasts of the same team's games. Accordingly, I concur with the general substance of the majority's approach to pay-cable carriage of sports, if not with the specific details of their restrictions.

V. CONCLUSION

I would have preferred that at least a five-year moratorium on all filmed programming restrictions be adopted by the Commission at this critical juncture in the history of a very new medium. In the face of the evidence before us, our failure to relax our rules to this extent is, I think, a throwback to our mercantile past which would be quaint if it did not promise to work needless harm on an infant industry. Broadcasters have reason to fear pay television; it threatens to preexpose their best product to more households and to offer the potential for extending twenty or more channels of cable television into areas not now served by the medium. No doubt each of these developments will reduce broadcast licensees' net revenues. But I do not see that fact as warranting the sort of intervention that these rules represent. The FCC does not sit to protect broadcasters' profits. It must act to protect the public interest, and I believe that interest to be served by the free and open development of pay cable. Given the importance of certain live sporting events, such as the World Series or the Super Bowl, and the absence of a competitive mechanism to expand their numbers if they are appropriated by any form of pay television, I concur in placing certain "siphoning" restrictions on sports. But even here I think the rules are somewhat more restrictive, and more complex, than necessary.

The latter point—the complexity of the rules—bears special emphasis. This is a complaint which I think can legitimately be made of our cable rules generally (and, indeed, all of our radio and television rules generally—including broadcasting as well as cable), but the present proceeding highlights just how serious the problem has become. Our rules—and most important the purposes beneath them—have grown in complexity to a point beyond understanding except by a small number of specialists. It was once remarked by Baron Rothschild that only two men really understood gold—an obscure clerk in the Bank of France and one of the directors of the Bank of England. Unfortunately, he noted, "they disagree." Without in any way suggesting that our new rules are golden, I fear the Baron's remarks are all too apt here.

FCC 75-925

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
AMENDMENT OF PART 76, SUBPART G, OF THE COMMISSION'S RULES AND REGULATIONS PERTAINING TO THE CABLECASTING OF PROGRAMS FOR WHICH A PER-PROGRAM OR PER-CHANNEL CHARGE IS MADE	Docket No. 19554
AMENDMENT OF SECTIONS 73.643 (b)(2) AND 74.1121 (a)(2) OF THE COMMISSION'S RULES AND REGULATIONS PERTAINING TO THE SHOWING OF SPORTS EVENTS ON OVER-THE-AIR SUBSCRIPTION TELEVISION OR BY CABLECASTING	Docket No. 18893

MEMORANDUM OPINION AND ORDER

(Adopted July 31, 1975; Released August 8, 1975)

BY THE COMMISSION: COMMISSIONER ROBINSON CONCURRING IN PART AND DISSENTING IN PART FOR THE REASONS SET FORTH IN HIS STATEMENT ATTACHED TO FIRST REPORT AND ORDER, FCC 75-369, RELEASED APRIL 4, 1975, ON PAY CABLE TELEVISION, 52 F.C.C. 2ND 1).

1. On March 20, 1975, the Commission adopted its *First Report and Order in Dockets 19554 and 18893*.[1] (Hereafter referred to as the *First Report and Order*). That action revised Sections 73.643 and 76.225 of the Commission's Rules which govern the use of feature films, sports events, and series type programs by subscription over-the-air television (STV) and cable television operations for which a per-program or per-channel charge is made. Petitions for reconsideration of this *First Report and Order* filed pursuant to Section 1.106 of the Rules have been received from the National Association of Broadcasters (NAB), American Broadcasting Companies, Inc. (ABC), CBS, Inc. (CBS), National Association of Maximum Service Telecasters (MST), a group of television stations licensees (Television Licensees), Spanish International Communications Corporation (SICC), Twin County Trans-Video, Inc. (Twin County), and the National Hockey League (NHL).

2. Petitioners representing broadcast interests generally contend that the rule modifications adopted in the *First Report and Order* represent a departure from the Commission's previous policy concerning subscription television and are detrimental to the public interest because they will allow programs now found on conventional television to be "siphoned" away to subscription television. It is argued that subscription television ought to be required to provide new and diverse programming, and that the Commission's rules should place stronger

[1] FCC 75-369, 52 FCC 2d 1 (1975).

restrictions on the subscription use of feature films, sports events, and series programs which are now available in sufficient quantity over conventional television. Petitioners contend that the revised rules will result in program siphoning, thereby depriving the many who rely on conventional television for popular entertainment programming in favor of the few to which subscription television is available and who can afford to pay a special fee for the privilege of viewing it.

3. Those who discern a departure from our previous policy regarding subscription television have misread the *First Report and Order*. It is abundantly clear from that document that our policy has been and continues to be one of regulating subscription television so that it provides a beneficial *supplement* to conventional broadcasting, without undermining the continued operation of that advertiser supported television service.[2] Our goal is to maintain the existing conventional television structure while at the same time to encourage the development of alternative sources of television programming. Our hope is that subscription television will offer unique and diverse programming of the type not generally found on conventional television. However, as we recognized in the *Report and Order in Docket 19988*, creativity and interest cannot be mandated by law or contract.[3] Subscription interests contend that diverse and specialized programming will be provided, but that it must be accompanied by programming having broad public appeal, such as feature films, sports and series. Whether the promise of subscription television will, in fact, be fulfilled will be determined by future events. For the present, it cannot be disputed that subscription television will add to the viewing choices available to the public, so long as existing conventional television is not impaired. The rules adopted in the *First Report and Order* represent our best judgment as to what regulation is reasonably necessary to preserve the present system of conventional television. As we repeatedly stated in the *First Report and Order*, should our rules fail to provide adequate anti-siphoning protection, we will promptly consider remedial action. The proceeding in Docket 19554 was left open to facilitate such action in the event that it is required. The rules adopted in the *First Report and Order* do not represent a departure from previous Commission policy, nor do they mean that the public will be deprived of the present quantity and quality of conventional television programming. To the contrary, the new rules continue to preserve the existing level of conventional television programming while, in certain areas, allowing for the presentation of more subscription programming to those who can and wish to take advantage of that supplemental service.

4. In their reconsideration petitions, several broadcast interests claim that the *First Report and Order* fails to properly reflect the views of minority and other public organizations which supported retention of the previous subscription rules. They contend that the *First Report and Order* creates the impression that minority and other non-industry groups were nearly unanimous in their opposition to the previous rules, without mentioning that sixteen representatives of such groups appeared at the oral arguments and supported retention of the then existing rules. Among these representatives were the

[2] See, in particular, paragraphs 144 through 146 of the *First Report and Order*.
[3] *Report and Order in Docket 19988*, FCC 1279, 49 FCC 2d 1090 (1974).

Reverend Jesse L. Jackson, National President, Operation PUSH, and Livingston L. Wingate, Executive Director, New York Urban League, as well as representatives of several civic and labor organizations.

5. Almost half of the *First Report and Order* was devoted to a summary of the comments advanced during the pendancy of the proceeding. In light of the broad interest evoked by the proceeding, we were especially diligent to apprise the parties and the public of the various positions and arguments which were considered during the decision making process. Although the arguments of each individual party were not addressed point by point, the summary of comments demonstrates the existence of an ample and complete record which fully justifies the conclusions that we reached.

6. We stated in paragraph 143 of the *First Report and Order* that "[b]ecause of the vast number of comments submitted, only a few of the more comprehensive comments have been given specific mention. However, we believe that the views of each party to this proceeding are fairly represented in our summarization." The testimony of the minority and other public organizations which supported retention of the previous subscription rules generally reiterates the position advanced by the major broadcast interests whose comments were summarized in paragraphs 25 through 46 of the *First Report and Order*. This position having once been stated, we did not see the need for its repetition. We did not, however, intend to give the impression that all non-broadcast oriented groups favored a relaxation of the subscription rules, and if such an impression was given, we trust that the discussion herein will set the record straight. In any case, our failure to specifically mention some of the individuals and groups who participated in the proceeding does not, in itself, compel reconsideration of our decision.

7. All of the petitions for reconsideration express general displeasure with the new rules and many of the basic arguments in favor of or opposed to strict anti-siphoning rules are repeated. These arguments were discussed at length in the *First Report and Order*, and no purpose can be served by responding to them once again here. Therefore, the following discussion concentrates on specific provisions of the new rules which we have been asked to reconsider.

8. *Market Definition* Twin County Trans-Video, Inc. (Twin County), operator of several cable television systems in Pennsylvania, requests reconsideration of the provision of the new subscription cable television rules which defines "the market" in which a cable television system is located to include all commercial television broadcast stations required to be carried by the system pursuant to the cable television signal carriage rules. (See paragraph 164 of the *First Report and Order*.) Twin County submits that the Commission's definition of the market of a cable television system is overly broad and should be revised so that all cable systems located more than thirty-five miles from a commercial television station are excluded from the restrictions imposed by the subscription rules. Alternatively, Twin County requests waiver of the provisions of Section 76.225, as amended, to permit it to conduct an unrestricted pay cable operation

on its conglomerate system in Pennsylvania which is located outside of all television markets.

9. The main thrust of Twin County's argument for reconsideration is that anti-siphoning protection is not needed outside of television markets. Television markets are defined by Section 76.5 of the Rules to include the area within a thirty-five mile radius of the community to which a television station is licensed. Twin County submits that the Commission should provide consistency between its signal carriage, network exclusivity and pay cable rules by limiting the imposition of restrictions on pay cable operations to those cable television systems located within a television market. In support of this position, Twin County asserts that there are approximately 90 cable television systems with 5,000 or more subscribers located outside all television markets. These 90 cable television systems are scattered throughout the fifty states, with no more than 13 cable systems located in any one state. According to Twin County, these systems serve approximately 893,625 subscribers, or less than 1.5 percent of the total number of television households in the United States.

10. Twin County's petition for reconsideration is opposed by the National Association of Broadcasters. The NAB argues that Twin County's request ignores the contrasting functions of the signal carriage and non-duplication rules on the one hand, and the subscription cablecasting rules on the other hand. The NAB points out that the purpose of the signal carriage and non-duplication rules is to ameliorate the impact of audience fragmentation with its attendant loss of revenue to the station and ultimately the services of that station to the public. In contrast, the subscription rules are intended to prevent siphoning of programming from conventional television to subscription television. It is estimated by the NAB that the number of cable television subscribers located outside all television markets would now approach two million, and that the potential for subscription cablecasting in these areas presents a significant siphoning threat.

11. Twin County has not persuaded us to revise the market definition contained in the subscription cablecasting rules. The NAB correctly characterizes the separate problems addressed by the subscription rules as compared with the signal carriage and non-duplication rules. We have concluded that, as a general proposition, cable television operations located outside of all television markets will not significantly fragment the audiences of television stations.[4] But this conclusion does not logically foreclose the application of anti-siphoning rules in areas outside all television markets. Subscription television presents a program siphoning threat to conventional television because the former service is able to garner substantially more revenues per viewer, by assessing a direct charge on subscribers, than conventional television, which must rely on advertising revenue. The difference between these two financial bases makes it possible for a relatively few subscribers paying a direct fee to attract programming away from conventional viewers who, through advertiser support, generate only a few cents each toward the purchase of programming. Although the number of potential cable subscribers located outside all television markets may

[4] It should be noted that our network program non-duplication rule provides an additional 20 miles of protection around smaller television markets. See Section 76.92 of the Rules.

not be sufficient to significantly fragment the audiences of nearby television stations, this same number of potential subscription viewers may be able to siphon programming away from television stations in adjacent markets. This possibility is particularly acute in the heavily populated area between the Philadelphia and New York City television markets where Twin County operates its cable systems. Therefore, on the basis of the facts before us, we are not persuaded to exempt cable television systems located outside all television markets from the restrictions imposed by our subscription cablecasting rules, and we will proceed with the regulatory framework adopted in the *First Report and Order*.

12. In support of its alternative request for waiver of the subscription cablecasting rules, Twin County states that only a few cable systems in the country are authorized to carry as many television signals as is Twin County. Because of the popularity and diversity of Twin County's current service offering, it requires substantially more and better than normal programming for a successful pay cable operation. Twin County asserts that potential audience diversion among its approximately 50,000 subscribers from advertiser to viewer-supported programs would be *de minimis*. Additionally, Twin County claims that a grant of the requested waiver will provide an ideal opportunity for an experiment in unrestricted pay cable operations. Twin County offers to furnish the Commission with periodic progress reports on the development of its pay cable services in the event that a waiver is granted.

13. Twin County has failed to establish the existence of a compelling need for the waiver it seeks. Although it states that the large number of television signals it carries necessitates that it provide subscription programming of high quality, Twin County does not attempt to explain why the quality and quantity of subscription programming now permitted by the rules is not sufficient to meet its needs. Absent this showing of need for relief, we would not be justified in granting a waiver of our rules. Therefore, Twin County's alternative request for waiver will be denied.

14. *Feature Films* Petitioners NAB, ABC, NBC, CBS, MST and Television Licensees claim that there has been no showing made to justify the modifications of the feature film rules which were adopted in the *First Report and Order*, and they request that the Commission reinstate the previous rules. Their petitions are opposed by Mr. Henry Geller, the National Cable Television Association (NCTA), United Artists Corporation (UA), and several program suppliers filing jointly (Program Suppliers).

15. With regard to the provision permitting the subscription use of feature films during the first three years after their theatrical release, it is argued that the previous two-year provision allowed for adequate subscription use, and that the new three-year provision will delay the exhibition of many films on conventional television. In its petition, NBC directs our attention to oral testimony given in this proceeding where it was stated that twenty-three percent of all the feature films on the NBC Television Network shown for the first time during the 1972–73 season had been first released to theaters less than two years earlier. Another twenty-six percent of the films on NBC shown for the first time that season were between two and three years old. In their opposition, the Program Suppliers answer NBC's argument by

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stating that seventy-two percent of the feature films first shown on television during the 1973–74 season were more than three years old, and that the average (mean) age of the films was five years and two months.

16. In paragraph 166 of the *First Report and Order* we stated that the three-year provision would provide a reasonable balance between the interest in allowing for subscription exposure of new films and the interest in their timely exposure over conventional television. We realize that because the theatrical runs of feature films vary widely, no specific time limit can be found which allows for some subscription exhibition of all films without leaving some possibility for delay of their conventional showing. Present marketing practices indicate that a three-year limit is reasonable in most situations, although a few "blockbuster" films may not be made available for subscription use during this period, and other less popular films may complete their theatrical runs well within this period. At worst, the three-year provision may allow for a few months delay of the conventional exhibition of some feature films. Nevertheless, it continues to be our best judgment that the three-year provision constitutes a reasonable balance between the competing uses, and is that which best serves the public interest.

17. The petitioning broadcast interests claim that the "under contract" provision, which permits the subscription exhibition of any feature film available for conventional showing in the market, should be rescinded, at least until the Commission has resolved its current inquiry into program exclusivity practices.[5] The NAB and CBS assert that this provision creates a considerable potential for subscription operators to provide saturation exposure of many films technically available to conventional television before any conventional broadcaster is able to use them. Thus, they conclude, broadcasters will have considerable incentive to reduce the number of runs of feature films which they employ. Additionally, MST and the NAB predict that this provision will be utilized in a manner which frustrates the Commission's policy because it creates an incentive to make feature films "available" to conventional television stations under very limited circumstances so as to maximize subscription revenues.

18. An important part of our program exclusivity inquiry involves looking into the concurrent use of feature films by subscription and conventional television, which is made possible by the subject "under contract" provision. Experience with the operation of this rule may influence our decision as to whether rules are required to limit the degree of exclusivity obtained by either form of television. Therefore, to suspend the operation of this provision would eliminate one of the major reasons for our having commenced the exclusivity proceeding. The audience fragmentation argument posed by the NAB and CBS is misdirected. As pointed out by the NAB itself, the problem addressed by the subscription rules is siphoning, not audience fragmentation, and it cannot be argued that the "under contract" provision permits siphoning. Finally, the arguments of MST and the NAB concerning limited availability periods were dealt with in paragraph 171 of the *First Report and Order*. We stated there that

[5] *Notice of Inquiry in Docket 20402*, FCC 75–371, 52 FCC 2d 87 (1975).

we did not expect the "under contract" provision to alter existing patterns of feature film distribution. If this were to happen, adjustments in the rule might be required. Petitioners have not made a convincing showing that adjustments are necessary at this time.

19. The broadcast interests contend that the provision permitting subscription exhibition of any feature film over ten years old which has not been broadcast in the market during the previous three years will fail to prevent siphoning and should be deleted. As stated by the NAB on page 4 of its petition, their argument is as follows:

> What the Commission should have focused on was the post-seven year distribution pattern, at which point the film already will have been shown in theatres, on pay-TV, and on network television. In many cases, the film also will have entered syndication before the seven year period expires. What the Commission has managed to ignore in its discussion of the film producers' interest in obtaining revenues from free television exhibition is the fact that, most films will have produced considerable revenue from free TV exhibition before the three year "no show" period could begin. Certainly, the film producer will have recouped his production costs and made a substantial profit by the time the film has been in general release for seven years. Thus, contrary to the Commission's stated reasoning, he will not be faced with economic pressures to continue to sell the film to free television.

20. The primary purpose of the "over ten" provision of the feature film rules is to make available for subscription use the thousands of older feature films not desired for conventional television exhibition. (See paragraph 172 of the *First Report and Order*.) Because these "undesirable" films cannot be neatly segregated from the great mass of older feature films in existence, we were required to draft a rule which applies generally to all older films, but which contains safeguards to prevent the withholding of "desirable" films from the conventional television market. If the scenario posited by the NAB is correct, and there is still demand for a film's exhibition on conventional television after multiple showings by that medium, what we are being asked to assume is that the potential subscription value of the film three years hence will outweigh its immediate value to conventional television. At this point, the public will have already had an opportunity to view the film over conventional television, and perhaps several showings will have occurred. Thus, the issue here is not siphoning in the strict sense of the term, but whether such films will continue to be shown over conventional television. It is not unreasonable to assume that the subscription value of a film ten years after its theatrical release will be considerably less than that of newer films not yet seen on conventional television. It appears to us that, for such a film, the imbalance in purchasing power between advertiser supported and direct payment television will be more than made up for by the three-year hiatus requirement. We do not believe that the subscription value of such older films which have had conventional television exposure will be sufficient to cause it to be forever withheld from the conventional market. We suspect that such older films will eventually be alternately displayed on conventional and subscription television until their public appeal is entirely exhausted.

21. To assure that this process will actually occur, CBS proposes that the rule be modified to require that any film more than ten years old that is offered by subscription television, be offered in the market only during a period determined by the Commission to constitute the

length of one normal subscription television run. This period might be a week, month or some other period that the Commission determined to be reasonable. After the subscription run has finished, the film would not be available to subscription television for the following three years. At the end of that three-year period, if not broadcast by conventional television, the film would again become available to subscription television for one run.

22. The proposal of CBS is directed at those older films which are desirable for conventional telecasting. The great bulk of older films need not be subject to anti-siphoning restrictions because they are not desired for conventional telecast. (See comments of Metromedia summarized in paragraph 38 of the *First Report and Order.*) Nevertheless, the modification that CBS proposed would place additional restrictions on the subscription use of these films. Additionally, it would require all subscription operations within a certain market to simultaneously exhibit a particular older film during the subscription run period set by the Commission, after which the film would not be available to them for another three-year period. We do not believe that the modification proposed by CBS is necessary to assure the availability of older films for conventional telecast. Once a film is over ten years old and has been exhibited on a subscription basis pursuant to our existing rules, the economic incentive to withhold the film from conventional television is greatly reduced, and the need for additional protection is outweighed by the burdens such protection would impose.

23. The petition of CBS also suggests that we undertake a study to determine the amount of revenue available for the purchase of older films in the respective subscription and conventional television markets, and establish a holding period based on our findings. Because of the nascent state of the subscription market, we do not believe that such a study would be productive at this time. We believe that experience with our new rule will best establish its worth, or demonstrate the need for its modification.

24. Spanish International Communications Corporation (SICC) and MST have requested reconsideration of the provision which exempts foreign language films from the restrictions imposed by the subscription rules. SICC states that the provision amounts to unconstitutional discrimination in treatment as to Spanish language television stations *vis-a-vis* English language stations, and that there is no evidence which would warrant the special treatment afforded foreign language films.

25. We stated in paragraph 177 of the *First Report and Order*, that we do not foresee foreign language subscription programming as having any significant impact on conventional television service. Our subscription rules are designed to maintain the availability of conventional television programming, which consists primarily of English language programs. Where foreign language films are not being telecast by conventional stations, they cannot be siphoned. Because foreign language programming is not generally provided by conventional television stations, the need to impose anti-siphoning restrictions on this type of programming is generally not present. In the exceptional case where it can be demonstrated that application of the anti-siphoning rules to foreign language films is required to protect the public interest, the special relief provisions of our rules provide a readily acces-

sible vehicle for obtaining necessary Commission action. This approach is consistent with our cable television signal carriage rules. Without a showing of adverse impact on local television service, cable systems are not restricted as to the number of signals from distant foreign language broadcast stations that they carry. The presumption that the subscription use of foreign language feature films will not adversely affect local television service is no more unreasonable or discriminatory than the presumption against local impact resulting from the importation of distant signals from foreign language stations. In both cases, the difference in treatment *vis-a-vis* English language and foreign language programming is reasonable in light of the specialized nature of foreign language programming and the public interest in encouraging its dissemination.

26. *Sports.* Petitioners CBS, MST and NAB request reconsideration of the sports provisions adopted in the *First Report and Order.* Particularly, the Commission is requested to place restrictions on the subscription exhibition of entirely new sports events, establish separate categories for regular-season and post-season non-specific events, preclude subscription exhibition of all remainder games in categories in which conventional television has met the twenty-five percent or greater coverage test, restrict subscription exhibitions in categories in which conventional television has not achieved a twenty-five percent or higher "high water mark" to fifty percent of the remainder games, and adopt a provision giving conventional television first choice of the games to be carried.

27. The discussion in paragraphs 186 through 208 of the *First Report and Order* sets forth the conclusions upon which we premised our new sports provisions. The above-mentioned petitions for reconsideration allege no new information which causes us to doubt the correctness of these conclusions. With regard to entirely new sports events, we believe that the need for conventional television exposure to popularize new sports will assure their availability to that medium. As to regular-season and post-season non-specific events, we realize that the potential for "frontloading" or "creamskimming" exists when they are included in a single category. We also realize that the alternative of placing each type of event within a separate category presents considerable difficulty because the number of post-season events to be played by a particular team cannot be forecast with any certainty. On balance, the disposition decided upon in paragraphs 197 and 198 of the *First Report and Order* appears to be the most reasonable solution. We think it worth repeating here, however, that if "frontloading" or "creamskimming" occurs, we will be required to take a second look at this provision and to consider its revision so that observance of our policy is assured.

28. We see no need to further restrict the number of "remainder games" available for subscription use in either the situation where twenty-five percent or more of the games have been conventionally televised, or where less than twenty-five percent have received conventional television exposure. The public interest in maintaining conventional telecasts is greatest where many events have been televised in the past, and these events are afforded the greatest anti-siphoning protection. With regard to events less often televised, the rules seek to maintain

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the past level of conventional telecasts while allowing for the subscription exhibition of the remainder games which would otherwise not be viewed on either medium. The proportional reduction provision is not applied to the under twenty-five percent situation because we regard it to be less needed, and because application of this provision might drastically curtail subscription exhibitions when conventional telecasts are reduced by only one or two games. Events not receiving substantial conventional television exposure were treated in a similar fashion pursuant to our previous sports rule, and no siphoning effects were experienced. We expect that our present rule will be equally effective.

29. We considered in paragraphs 204 and 205 of the *First Report and Order* the suggestion that conventional television interests be allowed to choose and to "preempt" the sports events desired for telecast, and concluded that such a provision would add unwarranted complexity to our rule and might produce unforeseen and unwanted results. We again reject the suggestion that such a preemption provision be incorporated within the rules. However, should we find that desirable sports events are being withheld from conventional television in order to provide for their subscription exhibition, we would consider giving effect to such a provision in order to prevent frustration of our anti-siphoning policy.

30. The National Hockey League (NHL) has also requested reconsideration of the sports provisions. This petition is opposed by ABC. Although it generally disagrees with the Commission as to the need for sports anti-siphoning rules, the thrust of the NHL's petition is directed at four alleged "technical deficiencies" in the *First Report and Order*. The first of these concerns the proportional reduction provision discussed in paragraph 200. The NHL claims that this provision will reduce the number of events available for subscription exhibition even though no siphoning has taken place, and that the sports rules afford adequate siphoning protection without this provision. If the provision is retained, the NHL requests that the base period governing its operation be reduced from the present five years to one year.

31. We recognize that the proportional reduction provision does not take into account situations where conventional telecasts are reduced for reasons unrelated to siphoning. As we previously stated, in these situations we would be disposed to grant waivers to maintain existing levels of subscription exhibitions. However, without this provision, the relaxation of the earlier sports rules brought about in the *First Report and Order* would encourage immediate siphoning of sports events until the number of subscription exhibitions equals half the number of events not conventionally televised in the high water mark year. By applying a one-year base period to the proportional reduction provision, the penalty for siphoning exacted by the rule might not outweigh the economic benefits to be gained from the practice. We therefore believe that the existing proportional reduction provision is required, and will rely upon the special relief provision of our rules to remedy any anomalies that it might create.

32. The second matter discussed by the NHL concerns our decision in paragraph 197 of the *First Report and Order* to eliminate the old "games of the week" category. The NHL argues that teams generally

have little or no control as to the number of their games that will receive network coverage. Thus, a temporarily attractive team may show up on the network game of the week a number of times in a given season, which would have damaging effects on its ability to sell its games to subscription television, particularly when the proportional reduction provision is in effect.

33. This problem was alluded to in paragraph 203 of the *First Report and Order*. There we stated that where a network telecast had the effect of unreasonably restricting the events available for subscription exhibition, we would entertain a request for waiver of the rules. We believe that this approach will satisfactorily remedy situations where a particular team's games receive an unusual amount of network coverage. Reinstating the game of the week category would only add to the complexity of the rule and might reduce its effectiveness to prevent siphoning.

34. The NHL also requests the Commission to revise its definition of delayed telecasts which is discussed in paragraphs 188 and 189 of the *Fourth Report and Order*. It is argued that a delayed telecast should be defined as one commenced a half hour or more after an event is begun, rather than one commenced after the conclusion of the event. According to the NHL, such a change would encourage the delayed telecasting of home games and would not be contrary to the Commission's policy. Alternatively, the NHL requests that the definition be modified to take into account the possibility of "run-overs" by defining a delayed telecast as one commenced after the *scheduled* conclusion of an event, rather than its actual conclusion. This would eliminate scheduling uncertainties resulting from the possibility of an event lasting an unusually long time.

35. There is some point where a "delayed" telecast of an event may be virtually like a live telecast in terms of the viewing interest it engenders. This point will vary depending on the type of event to be televised. A half hour delay in the telecasting of a golf match or the Olympic games may be, for all practical purposes, the same as a live telecast. Because no particular time period will distinguish a live telecast, or its equivalent, from a delayed telecast in the case of every type of sports event, we believe that the conclusion of the event is a natural and reasonable dividing line for purposes of the sports rule. With regard to the alternative proposal of the NHL, we agree that our present definition of the term "live" presents unnecessary problems in the case of runovers. We therefore will modify the legislative history contained in paragraph 189 of the *First Report and Order* to define the term "live" as any telecast or cablecast that is simultaneous with the actual occurrence of the event or the delayed tape showing of which is begun prior to its scheduled conclusion.

36. Finally, the NHL objects to our decision to apply the league average of games telecast to relocated and expansion teams. At most, the NHL states a relocated franchise should take its prior broadcasting history with it.

37. The operation of the sports rules requires the application of some previously established pattern of conventional telecasts. Having decided that relocated and expansion teams should be covered by the subscription rules, the league average alternative discussed in paragraph

201 of the *First Report and Order* appears to be the most reasonable standard in lieu of an actual telecast history. Of course, this standard is artificial, but it is the only standard available until the relocated or expansion team establishes its own history of telecasts. With regard to relocated teams, we see no reason why a team's telecasting pattern developed in its old location, will more accurately predict the telecasting pattern to be established in its new location than will the league average. We, therefore, see no compelling reason to apply different standards to relocated teams and expansion teams.

38. *Series.* In its petition for reconsideration, CBS requests the Commission to amend the series rule to prohibit the subscription exhibition of "spin-offs" or other derivatives of series created by and for conventional television. Because the series rule adopted in the *First Report and Order* is merely an interim measure and is likely to be revised pursuant to the inquiry commenced by the *Second Further Notice of Proposed Rule Making in Docket 19554*,[6] questions concerning the series rule can best be resolved together with the other issues to be considered in that proceeding. Therefore, we will postpone consideration of the proposal of CBS and take it up when we consider the comments filed pursuant to the *Further Notice.*

39. The foregoing discussion addresses requests for reconsideration of various subscription television provisions adopted in the *First Report and Order.* Several reconsideration petitions also request that the cable rules be amended to broaden their scope. Four changes in the rules are sought: (1) a rule that would require prior notice of pay cable operations and would provide a method for obtaining information on a regular basis as to the extent of pay cable growth, including the programs being carried and the charges: (2) a provision applying the feature film, sports and series rules to all cablecasting, not just to that for which a special charge is made; (3) a rule limiting to one the number of channels permitted for movies and sports combined; and (4) a modification of the "ninety percent rule" to induce more diversity and innovation.

40. Each of these proposed changes was discussed and rejected in the *First Report and Order.* (See paragraphs 154 through 159 and 212 through 213.) Petitioners have produced no new evidence to support their arguments and we have no reason to reverse our decisions. For the reasons stated in the *First Report and Order*, each of these requests for reconsideration is denied.

41. In the petitions for reconsideration, much is made of the reports that the number of pay cable subscribers has almost doubled during the past year and that this rate of growth is likely to continue during the next several years. Contrary to the arguments of some petitioners, this evidence does not indicate that our subscription rules should be further tightened. The rules adopted in the *First Report and Order* were drafted with the expectation that the subscription industry would experience considerable growth in the future. In rejecting the proposed moratorium on feature film restrictions, we stated in paragraph 162 of the *First Report and Order* that the regulatory framework for the subscription industry should be established

[6] FCC 75-370, 52 FCC 2d 83 (1975).

now, during its developmental stage, so that its growth will be accompanied by a relatively stable regulatory climate. Additionally, to the extent that public impact can be forecast, reasonable regulations to protect the public interest should be imposed before the impact is felt, not after the public interest has already suffered. For these reasons, the subscription rules were drafted with an eye toward the future, and we are confident that they will be adequate, with the possibility of some minor modifications, to fully meet the needs for which they were adopted. Growth of the subscription industry is not, therefore, cause for alarm. It is, rather, evidence of the need for, and the reasonableness of, the rules which we adopted in the *First Report and Order.*

42. Although not brought up in the petitions for reconsideration, one additional matter has come to our attention which calls for a minor revision of the subscription cablecasting rules. Section 76.225 (a) (3) of the Rules requires cable systems over which feature films are cablecast to keep certain records pertaining to the consistency of the cablecasts with the subscription rules. In keeping with the policy expressed in paragraphs 214 and 215 of the *First Report and Order*, this section should be amended to provide that such records are to be maintained by either the cable system operator or channel lessee, depending upon which individual or entity exercises editorial control over the subscription programming being provided. In the case of either a channel lessee or a system operator who obtains subscription programming from a network, the required records may be housed in the main business office of such network. This procedure is consistent with the record keeping requirements of our sponsorship identification rules.[7] We believe that this modification will more appropriately assign responsibility for maintaining the required records and will, in some instances, ease the administrative burden of keeping such records.

43. In conclusion, we have found that the petitions for reconsideration contain many of the same arguments put forth prior to the adoption of the *First Report and Order*, and present no new evidence which calls for reconsideration. Some petitioners point out matters which might call for future modifications, but we have determined that such changes can best be accomplished after experience has been gained with the operation of the rules. For now, the subscription rules represent our best judgment as to what is required for the better and more efficient use of the airwaves. In those situations where the public interest and the operation of our rules might diverge, we are confident that the liberal waiver policies enunciated in the *First Report and Order* will provide an adequate mechanism for obtaining special relief.

Authority for the rules adopted in the Appendix attached hereto is contained in Sections 2, 4(i) and (j), 303, 307, 308, and 309 of the Communications Act of 1934, as amended.

Accordingly, IT IS ORDERED, That the petitions for reconsideration filed by the parties enumerated in paragraph 1, *supra*, ARE GRANTED to the extent indicated herein and otherwise ARE DENIED.

IT IS FURTHER ORDERED, That the alternative petition for special relief filed by Twin County Trans-Video, Inc., IS DENIED.

[7] See paragraph 33 of *Report and Order in Docket 19513*, FCC 75-417, 52 FCC 2d 701, 721 (1975).

IT IS FURTHER ORDERED, That Part 76 of the Commission's Rules and Regulations, IS AMENDED, effective September 22, 1975 as set forth in the attached Appendix.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX

Parts 76 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 76—CABLE TELEVISION SERVICE

In Section 76.225 the headnote and par (a) (3) are amended to read as follows:

§ 76.225 SUBSCRIPTION CABLECASTING.

* * * * * * * * *

(a) * * *

(3) Every cable television system operator or channel lessee engaging in origination or access cablecasting pursuant to this paragraph shall maintain, or cause to be maintained, for public inspection a file listing the title of the film, the date on which it was cablecast and the provision of this paragraph pursuant to which it was cablecast. When a feature film is cablecast pursuant to subdivision (1) (ii) of this paragraph, the station or network serving the market and holding a present contractual right to exhibit the film shall be specified. These files shall be retained for a period of two years.

Appendix E

In the Matter of

Amendment of Part 76, Subpart G, of the Commission's Rules and Regulations Pertaining to the Cablecasting of Programs for Which a Per-Program or Per-Channel Charge is Made.*

Docket No. 19554

Adopted: October 31, 1975
Released: November 7, 1975

SECOND REPORT AND ORDER

By the Commission: (Commissioner Hooks and Quello concurring in the result).

1. On March 20, 1975, the Commission adopted its First Report and Order in Docket 19554, FCC 75-369, 52 FCC 2d 1 [33 RR2d 367] (1975), recon. denied, FCC 75-925, 54 FCC 2d 794 (1975) (Hereafter First Report and Order). That action revised §§ 73.643 and 76.225 of the Commission's rules which govern the use of feature films, sports events, and series type programs by subscriptions over-the-air television (STV) and cable television operations for which a per-program on per-channel charge is made.[1] A Second Further Notice of Proposed Rule Making in Docket 19554, FCC 75-370, 52 FCC 2d 83 (1975) (Hereafter Second Further Notice) was issued concurrently with the First Report and Order. In the Second Further Notice we requested comments on whether rules restricting the subscription use of series programs should be retained, and if so, whether the rules adopted in the First Report and Order

* This proceeding also deals with amending the over-the-air subscription television rules as well as the pay cablecasting rules.

[1] Subsequent use of the term "subscription television" is meant to include both STV and subscription cable television unless the contrary is specifically indicated.

should be further revised to more appropriately reflect the Commission's regulatory goals.

2. The "anti-siphoning" restrictions adopted in the First Report and Order reflect the Commission's long-standing policy of seeking to assure that subscription television will not seriously impair the capacity of the present system to continue to provide advertiser-financed programming of the present or foreseeable quantity and quality, free of direct charge to the public.[2] In our March action, we concluded that the previously existing rules governing feature films and sports programming were in need of revision and we made some significant changes in the rules. We also questioned whether it was necessary to continue to restrict the subscription use of series programs. Because the record was not sufficient for us to conclude that all series program restrictions should be abandoned, we retained the series rules in a modified form and issued the Second Further Notice in order to collect information that would provide a basis for a decision as to whether the public interest requires the maintenance of series program restrictions, and if so, whether the present rules should be modified from their present form.

3. The previous subscription rules included an outright ban on the subscription use of series type programs. In the First Report and Order, this broad proscription was relaxed to allow the subscription use of entirely new series programs no episode of which has been exhibited on conventional television. We emphasized, however, that these new rules were merely an interim measure, pending a final resolution of the issue subsequent to our study of the comments invited in the Second Further Notice.

4. In addition to posing the threshold question of whether any series restrictions were necessary, the Second Further Notice set out for comment a specific alternative to the present rules. The alternative proposal, modeled after the rules relating to feature films which were adopted in the

[2] A thorough discussion of the history and rationale of the anti-siphoning rules is included in the First Report and Order in Docket 19554, FCC 75-369, 52 FCC 2d 1 (1975).

First Report and Order, reads as follows concerning subscription cablecasting:

> (e) Series type programs shall not be cablecast by a cable television system except as provided in this paragraph.
>
> (1) The series has never been purchased for broadcast over conventional television;
>
> (2) A conventional television broadcast station licensed in the market holds a present contractual right to exhibit the series. For purposes of this subparagraph, a television station affiliated with a television network will be deemed to hold a present contractual right to exhibit a series if the network with which it is affiliated holds such a right;
>
> (3) The series has not been exhibited in the market over conventional television for three (3) years prior to its proposed cablecast;
>
> (4) The series consists of fifty (50) or fewer episodes.
>
> NOTE: For purposes of this paragraph, the exhibition of any episode of a series shall constitute the exhibition of the series.

A similar rule would apply to STV operations. We also invited comment on whether, if the present series restrictions are retained or some modified rules are adopted, the definition of series programs should be revised.

5. Regrettably, the comments inspired by our Second Further Notice are sparse in new information despite the burgeoning growth now taking place in the subscription cablevision industry. The fourteen parties who responded to our request for information merely restate the same arguments which were presented in the earlier stages of this proceeding. Having had several years to observe the trends in the subscription television industry, we must now determine whether the arguments which gave rise to our original series program rule warrant retention of some form of series program restriction, or whether experience has shifted the weight of evidence against maintenance of series program restrictions.

6. All of the parties generally agree that new and innovative series programs of the type not now exhibited over

conventional television should be permitted over subscription television. However, conventional television interests contend that the arguments advanced in favor of the 1968 series program prohibition continue to justify restrictions designed to prevent the siphoning of series programs from conventional to subscription television. These arguments are summarized by National Broadcasting Company, Inc. (NBC) as follows. First, series type programs remain a staple of conventional television, just as they were in 1968. Second, series type programs continue to attract wide audiences, just as they did in 1968. Third, receipt of a relatively small sum from a relatively small group of subscribers could make it worthwhile for subscription entrepreneurs to siphon attractive series programs from the general public. According to NBC only 1,250,000 subscribers paying eighteen cents each could generate $200,000, which was the estimated cost of an hour of prime time entertainment programming in 1974. To prevent realization of this siphoning potential, while allowing for the subscription exhibition of original and innovative series programs, American Broadcasting Companies, Inc. (ABC) and a group of television station licensees (Television Licensees) suggest the following regulatory approach:

(1) Pay cablecasting of off network series programming should be banned; there is no public interest in permitting pay cable to carry such programming for pay (thereby risking its availability to free television) and there is no diversity in such offerings.

(2) Pay cable exhibition of any non-network series program which has appeared on free television during any one of the five years preceding pay cablecast should also be banned; this is necessary to prevent the siphoning of series presentations (for example, Wild Kingdom) which are produced for syndication and are now widely available through free television.

(3) There should be no ban on the presentation by pay cable of any original productions which are innovative and diverse.

Additionally, ABC and Television Licensees propose that the definition of a series program be modified to include any program presentation characterized by episodes with interconnected plot or substantially the same cast of principal characters or where the episodes have been marketed utilizing the same title and the episodes are related by general theme or content. In order to prevent the siphoning of "spin-offs" or other derivatives of series created for conventional television, CBS Inc. (CBS) suggests that the Commission's series restrictions should include series with casts or characters substantially similar to, or derived from, those of a series, any episode of which has been broadcast by conventional television.

7. Cable television interests, program producers and certain non-industry groups contend that subscription television poses no substantial threat to the present level of conventional television programming, and urge the Commission to delete all restrictions on the subscription exhibition of series programs. It is argued that the vast pool of unused talent and production capacity that exists in the United States indicates that series programs can be created for subscription television without affecting the availability of such programming to conventional television. The siphoning of popular network series will not occur, it is claimed, because the potential reward from subscription television, either now or in the foreseeable future, could not begin to match the losses that would be sustained by cancelling the network run. Further, program producers state that almost all network series contracts give a purchase option not only from development stage to initial network production, but from one television season to another. It is claimed that these options extend for a period of five television seasons or more and prevent the transfer of series programs to other media. With regard to series programs available for syndication, program producers argue that they would be unwilling to sacrifice revenues returned by syndication sales for speculative subscription revenues. Subscription television entrepreneurs would not pay substantial sums for these programs it is claimed, because most series in syndication have already been exposed one or more times on network television.

8. Although the arguments and assertions of those opposed to and those in favor of series subscription program restrictions have remained essentially the same since our initial consideration of the program siphoning issue, our observation of the developing subscription television industry and our present analysis of the likely interrelationships

between the subscription and conventional television markets has convinced us that the program siphoning that we have sought to prevent is unlikely to occur in the absence of regulations restricting the subscription exhibition of series programs. For the reasons set forth below, it would appear that the market forces now in effect will operate to assure that the present level of series programs now available over conventional television will be maintained. This being the case, regulations which artificially restrict the distribution of series programs can no longer be justified.

9. When the original series rule was adopted in 1968, the Commission placed no restrictions on the subscription exhibition of "specials," variety shows and talk shows. With regard to "specials," we stated "that some competition between STV and free TV in the programming area may be beneficial to free TV and to STV as well, and we leave this type of programs to competing factors in the marketplace and the performer's desire for exposure."[3] In the absence of restrictions on these types of programs, we have not found instances of program siphoning despite the fact that such programs continue to attract large conventional television audiences. In fact, because these programs are not now exhibited in significant quantity by subscription operations, it would appear that there is little demand for such programs by subscribers.

10. It cannot be disputed that feature films and to a lesser degree sports events now constitute almost the entire quantity of subscription programming. The supply of this programming is relatively fixed vis-à-vis both the conventional and the subscription television markets. The primary markets for feature films and sports events are theaters and sports stadia, respectively. Television markets, although important revenue sources, constitute secondary markets for these programs and their supply is relatively inelastic with regard to television market demand. We have determined that the inherent capacity of the subscription television market to generate large revenues places it in a position to outbid conventional television for the fixed supply of feature films and sports events in existence. Hence, we have adopted rules to assure that this competitive inbalance does not result in the siphoning of

[3] Fourth Report and Order in Docket 11279, FCC 68-1174, 15 FCC 2d 466, 572 [14 RR 2d 1601] (1968).

feature films and sports events from conventional television to subscription television.

11. While television constitutes a secondary market for feature films and sports events, television is the primary market for series programs. Series programs are produced for and sold exclusively to the television market. Substantial evidence exists to support the claim of program producers that their industry contains a great amount of unused capacity.[4] Therefore, it would appear that increased demand in the television market for series programs will be met by increased supply.

12. We possess no evidence which indicates that the advertising revenues generated by conventional television will be diminished as a result of subscription operations. If the funds available to conventional television for the purchase of series programs remains the same, and the supply of series programs is elastic, the series programs available to conventional television are not likely to be affected in either quantity or quality by increased demand resulting from growth in the subscription television market. The only effect which might be expected from this increased demand is a corresponding increase in the number of series programs available for all forms of television.[5]

13. It is argued that once a series program has become popular on conventional television, its producer will withdraw future episodes from conventional television and they will be sold to subscription television where a higher price can be obtained. It does not appear, however, that this would be likely. We have been advised that almost all network series contracts include a purchase option from one season to another for a period of five or more television seasons. Such contracts bind the producer to the network and the producer has no freedom to transfer his programs. In view of the number of new series program offerings each

[4] The existence of such excess production capacity was noted in a number of comments filed in this and earlier phases of this proceeding and does not appear to have been seriously disputed. See for example the written comments and oral testimony presented on behalf of the Motion Picture Association of America, Inc.

[5] We have previously recognized the desirability of such an effect. In our prime time access proceeding we have sought to encourage the production of a body of new syndicated programming which would be available to all television broadcast stations. See, First Report and Order in Docket 19622, FCC 75-67, 50 FCC 2d 829, 836 [32 RR 2d 697] (1975).

year which must compete for a limited number of network positions available, it is likely that the networks will continue to have sufficient leverage to demand and receive similar contract provisions. In any case, there is no evidence that subscription operators would seek to compete for such programming, that subscriber demand for such programming would provide sufficient financial resources necessary to engage in any such competition, or that subscribers would accept the switch of such programming from a free to a pay basis. Therefore, series program siphoning from network television to subscription television does not appear to be a substantial possibility.

14. It can be argued that the foregoing analysis applies to the network television market, but not to the syndication market. The syndication market is primarily a secondary market for series programs, most syndicated series programs being originally produced for network exhibition. Because the supply of off-network series programs to the syndication market is in-elastic, at least in the short run, it may be argued that subscription television entrepreneurs will outbid syndication purchasers for series programs which have completed their network run, thereby reducing the supply of programs available for syndicated exhibition. However, this argument ignores the fact that, if there is an increase of demand for series programs as a result of developing subscription operations, this is likely to result in a net increase of series programs available to all forms of television. Although subscription television may purchase some off-network series programs which otherwise would have been purchased by the syndication market, the new demand created by subscription television may also cause new series programs to be produced, and these new programs would be available to the syndication market after their subscription run. Thus, any reduction of off-network series available to the syndication market may be offset by new series which will at some time be available to the syndication market. Additionally, because there is no evidence of strong subscriber demand for syndicated series programs, it is not at all certain that the subscription industry will purchase a significant number of these programs.

15. The foregoing discussion demonstrates that subscription television operations do not pose, at least at this point in time, the siphoning threat to series programs that we

once thought they might. We have seen no indication that the demand of the subscription market for series programs is great, and even if greater demand comes about, it would appear that unregulated market forces will maintain the supply of series programs now available to conventional television. Therefore, we have determined that our series program restrictions are no longer necessary. This conclusion should not be interpreted as a lessening of our concern with regard to program siphoning, however. Although we have deleted regulations which do not appear to be necessary, our policy remains the same. We will monitor future events closely, and stand ready to reimpose series program restrictions should subscription operations threaten to reduce the quantity and quality of series programs now available to the public over conventional television. We are leaving this proceeding open to facilitate our taking prompt further action should that become necessary.

Accordingly, it is ordered, that effective December 15, 1975, Parts 73 and 76 of the Commission's rules and regulations are amended as set forth in the attached Appendix.

It is further ordered, that the proceeding in Docket 19554 is retained open.

[Appendix]

§ 73.643 General operating requirements.—Subscription television broadcast programming shall comply with the following requirements:

(a) Feature films shall not be broadcast except as provided in this paragraph.

(1) A feature film may be broadcast if——

(i) The film has been in general release in theaters anywhere in the United States for three (3) years or less prior to its proposed broadcast;

(ii) A conventional television broadcast station licensed in the market of the subscription television broadcast station holds a present contractual right to exhibit the film. For purposes of this subdivision, a television station affiliated with a television network will be deemed to hold a present contractual right to exhibit a film if the network to which it is affiliated holds such a right;

NOTE: The manner in which the term "present contractual right" will be construed is explained in paragraphs

169 and 170, First Report and Order in Docket 19554, FCC 75-369, 40 FR 15546.

(iii) The film has been in general release in theaters anywhere in the United States for more than ten (10) years prior to its proposed subscription broadcast and the film has not been exhibited over conventional television in the market of the subscription television broadcast station for three (3) years prior to its proposed subscription broadcast. Once a film has been broadcast in the market pursuant to this subdivision or cablecast on a subscription basis pursuant to § 76.225(a)(1)(iii), such film may thereafter be broadcast on a subscription basis in the market without regard to its subsequent exhibition over conventional television;

(iv) The film is in a foreign language.

(2) Feature films otherwise excluded by this paragraph may be broadcast upon a convincing showing to the Commission that they are not desired for exhibition over conventional television in the market or that the owners of the broadcast rights to the films, even absent the existence of subscription television, would not make the films available to conventional television.

(3) Every subscription television broadcast station over which a feature film is broadcast pursuant to this paragraph shall maintain for public inspection a file listing the title of the film, the date on which it was broadcast and the provision of this paragraph pursuant to which it was broadcast. When a feature film is broadcast pursuant to subdivision (1)(ii) of this paragraph, the station or network serving the market and holding a present contractual right to exhibit the film shall be specified. These files shall be retained for a period of two years.

(b) Sports events shall not be broadcast live except as provided in this paragraph.

(1) A specific event may be broadcast if the event has not been broadcast live over conventional television in the market of the subscription television broadcast station during any one of the five (5) seasons preceding the proposed subscription broadcast. If a regularly recurring event takes place at intervals of more than one year (e.g., summer Olympic games), the event shall not be broadcast on a subscription basis if it has been broadcast live over conventional television in the market of the subscription television

broadcast station during any one of the ten (10) years preceding the proposed subscription broadcast.

(2) New specific sports events that result from the restructuring of existing sports shall not be broadcast on a subscription basis until five (5) seasons after their first occurrence. Thereafter, subscription broadcasts shall be governed by subparagraph (b)(1).

(3) The number of non-specific events which may be broadcast on a subscription basis in any given season shall be determined as follows:

(i) If less than twenty-five (25) percent of the events in a category of non-specific events were broadcast live over conventional television in the market of the subscription television broadcast station during each of the five (5) seasons preceding the proposed subscription broadcast, the number of events in the category broadcast on a subscription basis shall not exceed the number of events in the category not conventionally broadcast in that season among the preceding five (5) seasons when the largest number of events in the category were broadcast over conventional television.

(ii) If twenty-five (25) percent or more of the events in a category of non-specific events were broadcast live over conventional television in the market of the subscription television broadcast station during any one of the five (5) seasons preceding the proposed subscription broadcast, the number of events in the category broadcast on a subscription basis shall not exceed fifty (50) percent of the number of events in the category not broadcast in that season among the preceding five (5) seasons when the largest number of events in the category were broadcast over conventional television. However, if the number of events in the category to be broadcast over conventional television in the current season is a reduction from the number of events broadcast in that season among the preceding five (5) seasons when the largest number of events in the category were broadcast, the number of events in the category which may be broadcast on a subscription basis pursuant to this subparagraph shall be reduced in proportion to the reduction in events broadcast over conventional television.

NOTE: The manner in which this paragraph will be administered and in which "sports events," "new sports

events," "specific events," "non-specific events," "live telecast" and "category" will be construed is explained in paragraphs 186-208 of the First Report and Order in Docket 19554, FCC 75-369, 40 FR 15546.

(c) No commercial advertising announcements shall be carried during subscription television operations except for promotion of subscription television broadcast programs before and after such programs.

(d) Not more than 90 percent of the total subscription programming hours shall consist of feature films and sports events combined. The percentage calculations may be made on a yearly basis, but, absent a showing of good cause, the percentage of such programming hours may not exceed 95 percent of the total subscription programming hours in any calendar month.

(e) Any television broadcast station licensee or permittee authorized to broadcast subscription programs shall broadcast in addition to its subscription broadcasts, at least the minimum hours of nonsubscription programming required by § 73.651.

(f) No subscription television authorization or renewal thereof shall be granted to a party having any contract, arrangement, or understanding, express or implied, with other parties the provisions of which do not comply with the following policies of the Commission:

(1) Unless a satisfactory signal is unavailable at the location where service is desired, subscription television service shall be provided to all persons desiring it within the Grade A contour of the non-subscription television service provided by the station broadcasting subscription programs: provided, however, that geographic or other reasonable patterns of installation for new subscription services shall be permitted; and provided further, that, for good cause, service may be terminated.

(2) Charges, terms and conditions of service to subscribers shall be applied uniformly: provided, however, that subscribers may be divided into reasonable classifications approved by the Commission, and the imposition of different sets of terms and conditions may be applied to subscribers in different classifications: and provided further, that within such classifications deposits to assure payment may, for good cause, be required of some subscribers and not of

others; and, also for good cause, if a subscription system generally uses a credit-type decoder cash operated decoders may be installed for some subscribers.

(3) Subscription television decoders shall be leased, and not sold, to subscribers.

(g) All applications for subscription television authorization or renewal shall set forth, in such detail as the Commission may require, the terms of agreements and arrangements the applicant has or intends to have with other parties concerning the supplying of subscription television programs, including specifically any provision that such programs shall be presented at a particular time or during a certain number of hours during the day (or segments thereof) or week, any arrangement or understanding which might hinder or prevent the presentation of programs from different sources, or penalize the applicant for so doing, and, as to any arrangement or understanding with a party other than the producer of the program, any other arrangement or understanding of which the applicant has knowledge, between such other party and third parties, which prevents or hinders such other party from obtaining programs from different sources. The applicant shall use due diligence to ascertain the existence and nature of arrangements to which it is not a party.

§ 76.225 Subscription cablecasting.—Cable television system operators or channel lessees engaging in origination or access cablecasting operations for which a per-program or per-channel charge is made shall comply with the following requirements:

(a) Feature films shall not be cablecast by a cable television system subject to the mandatory signal carriage requirements of Subpart D of Part 76, except as provided in this paragraph.

(1) A feature film may be cablecast if——

(i) The film has been in general release in theaters anywhere in the United States for three (3) years or less prior to its proposed cablecast;

(ii) A conventional television broadcast station licensed in the market of the cable television system holds a present contractual right to exhibit the film. For purposes of this subdivision, a television station affiliated with a television network will be deemed to hold a present con-

tractual right to exhibit a film if the network to which it is affiliated holds such a right;

NOTE: The manner in which the term "present contractual right" will be construed is explained in paragraphs 169 and 170, First Report and Order in Docket 19554, FCC 75-369, 40 FR 15546.

(iii) The film has been in general release in theaters anywhere in the United States for more than ten (10) years prior to its proposed cablecast and the film has not been exhibited in the market of the cable television system over conventional television for three (3) years prior to its proposed cablecast. Once a film has been cablecast in the market pursuant to this subdivision, or broadcast on a subscription basis pursuant to § 73.643(a)(1)(iii), such film may thereafter be cablecast in the market without regard to its subsequent exhibition over conventional television;

(iv) The film is in a foreign language.

(2) Feature films otherwise excluded by this paragraph may be cablecast upon a convincing showing to the Commission that they are not desired for exhibition over conventional television in the market of the cable television system, or that the owners of the broadcast rights to the films, even absent the existence of subscription television, would not make the films available to conventional television.

(3) Every cable television system operator or channel lessee engaging in origination or access cablecasting pursuant to this paragraph shall maintain, or cause to be maintained, for public inspection a file listing the title of the film, the date on which is was cablecast and the provision of this paragraph pursuant to subdivision (1)(ii) of this paragraph, the station or network serving the market and holding a present contractual right to exhibit the film shall be specified. These files shall be retained for a period of two years.

(b) Sports events shall not be cablecast live by a cable television system subject to the mandatory signal carriage requirements of Subpart D of Part 76, except as provided in this paragraph.

(1) A specific event may be cablecast if the event has not been broadcast live over conventional television in the market of the cable television system during any one of the five (5) seasons preceding the proposed cablecast. If a regularly recurring event takes place at intervals of more than one year (e.g., summer Olympic games), the event shall not be cablecast if it has been broadcast live over conventional television in the market during any one of the ten (10) years preceding the proposed cablecast.

(2) New specific sports events that result from the restructuring of existing sports shall not be cablecast until five (5) seasons after their first occurrence. Thereafter, subscription cablecasts shall be governed by subparagraph (b)(1).

(3) The number of non-specific events which may be cablecast in any given season shall be determined as follows:

(i) If less than twenty-five (25) percent of the events in a category of non-specific events were broadcast live over conventional television in the market of the cable television system during each of the five (5) seasons preceding the proposed cablecast, the number of events in the category cablecast shall not exceed the number of events in the category not broadcast in that season among the preceding five (5) seasons when the largest number of events in the category were broadcast.

(ii) If twenty-five (25) percent or more of the events in a category of non-specific events were broadcast live over conventional television in the market of the cable television system during any one of the five (5) seasons preceding the proposed cablecast, the number of events in the category cablecast shall not exceed fifty (50) percent of the number of events in the category not broadcast in that season among the preceding five (5) seasons when the largest number of events in the category were broadcast. However, if the number of events in the category to be broadcast in the current season is a reduction from the number of events broadcast in that season among the preceding five (5) seasons when the largest number of events in the category were broadcast, the number of events in the category which may be cablecast pursuant to this subparagraph shall be reduced in proportion to the reduction in events broadcast.

NOTE: The manner in which this paragraph will be administered and in which "sports events," "new sports events," "specific events," "non-specific events," "live telecast," and "category" will be construed is explained in paragraphs 186-208 of the First Report and Order in Docket 19554, FCC 75-369, 40 FR 15546.

(c) Not more than ninety (90) percent of the total cablecast programming hours shall consist of feature films and sports events combined. The percentage calculations may be made on a yearly basis, but absent a showing of good cause, the percentage of such programming hours may not exceed ninety-five (95) percent of the total cablecast programming hours in any calendar month.

(d) No commercial advertising announcements shall be carried on subscription channels during such operations except before and after such programs for promotion of other programs for which a per-program or per-channel charge is made.

NOTE: As referred to in this section, "the market" of a cable television system includes all commercial broadcast stations which must be carried by the cable television system upon request pursuant to Subpart D of Part 76.

FCC 75-152

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re HOME BOX OFFICE, INC.	CSR 588
and TWENTIETH CENTURY-FOX FILM CORP. Petitions for Waiver of Section 76.225 (a)(1) of the Rules	CSR-652

MEMORANDUM OPINION AND ORDER

(Adopted February 5, 1975; Released February 19, 1975)

BY THE COMMISSION: CHAIRMAN WILEY CONCURRING IN THE RESULT; COMMISSIONER WASHBURN ABSENT; COMMISSIONER ROBINSON CONCURRING IN THE RESULT AND ISSUING A STATEMENT.

1. Before the Commission are two petitions requesting a waiver of Section 76.225(a)(1) of the Rules which, in general, prohibits the pay cablecasting of feature films more than two years in general theatrical release.[1] These petitions request a waiver of this rule in order to permit the exhibition on subscription or pay cablecasting of two of the most popular feature films ever produced: "Butch Cassidy and the Sundance Kid" and the "Sound of Music."[2] In the first instance, the petition for waiver was filed by Home Box Office, Inc., (hereinafter HBO) a self-described "pioneer in pay cablecasting" whose "sole business is to distribute programming which is presented on a pay cable basis." At the time of filing, HBO distributed such programming to cable television systems located in the metropolitan New York City area, New York State, New Jersey and Pennsylvania. Some 27,000 subscribers receive this programming. HBO's request to distribute "Butch Cassidy" was supported by the film's producer, Twentieth Century-Fox Film Corporation. American Broadcasting Companies, Inc., (hereinafter ABC) which has acquired network television exhibition rights to the film from Twentieth Century-Fox, has opposed the request. The second petition for waiver was filed by Twentieth Century-Fox, the producer of "Sound of Music." ABC,

[1] Section 76.225(a)(1) provides in pertinent part that: (a) Origination or access cablecasting operations for which a per-program or per-channel charge is made shall comply with the following requirements:

(1) Feature films shall not be cablecast which have had general release in theaters anywhere in the United States more than two (2) years prior to their cablecast: Provided, however, That during 1 week of each calendar month one feature film the general release of which occurred more than ten (10) years previously may be cablecast, and more than a single showing of such film may be made during that week.

[2] According to an unofficial tabulation by *Variety*, "Butch Cassidy" and "Sound of Music" have grossed from the United States and Canadian markets $44,000,000 and $83,891,000 respectively. *Variety*, January 8, 1975, p. 26.

which has lately acquired similar rights to "Sound of Music," filed a response suggesting that the "prudent course for the Commission would be to protect the integrity of its own processes by denying the waiver." For convenience, these petitions will be separately described below.

A. "Butch Cassidy and the Sundance Kid"

2. This film was released in October 1969. According to HBO, ABC acquired exclusive network television exhibition rights to "Butch Cassidy" on November 15, 1972,[3] which permits three "runs" or showings of the film during the period between September 1976 and the end of the 1979–80 television broadcast season. While no other network can exhibit the film prior to September 1976, nothing in the contract between ABC and Twentieth Century-Fox prohibits the theatrical re-release of "Butch Cassidy" or its exhibition on pay cablecasting. However, since the film is more than two years and less than ten years old, Section 76.225(a)(1) bars its exhibition on pay cable. HBO argues that the premises on which the pay cablecasting rules were grounded—the prevention of the siphoning of popular program matter from conventional television—have been satisfied in that the network exhibition of the film has been assured. Moreover, HBO points to the small size of the pay cable industry and declares that the exhibition of "Butch Cassidy" on pay cable prior to its network exhibition scarcely poses a threat to the broadcast industry, at least within the next two years, nor will it reduce the value of the film to ABC or the rest of the broadcasting industry. HBO urges expedited action on its petition since its exhibition on pay cable immediately after its re-release or just prior to its scheduled network showing would considerably lessen the value of "Butch Cassidy" to HBO and its appeal to cable television subscribers. In contrast, regardless of what action the Commission takes on this request, "Butch Cassidy" cannot appear on network television any sooner. To delay action until the subscription telecasting and cablecasting proceedings of *Docket 19554* are completed would not serve the public's interest, since the waiver of Section 76.225(a)(1) would be consistent with the purpose of the present rules.[4] Finally, HBO argues that denial of its waiver petition would constitute an unlawful prior restraint on freedom of speech, and generally assails the constitutionality of the present pay cablecasting rules. The rules are also said to violate the anti-trust laws by excluding competitors of the broadcast industry from some markets or otherwise imposing artificial constraints on the ability of cable systems to compete in the market by preserving the "oligopolistic" position of the three major networks. HBO asserts that the copyright laws are violated by the present rules in that they reduce the number of potential buyers of film product and thereby reduce the opportunities of film copyright holders to market their product.

3. Twentieth Century-Fox emphasizes that its contract with ABC does not preclude a pay cablecasting exhibition of "Butch Cassidy"

[3] In its pleadings, ABC states that the agreement was concluded on November 15, 1971.
[4] *Docket No. 19554* was established by a *Notice of Proposed Rule Making and Memorandum Opinion and Order*, FCC 72–652, 33 FCC 2d 893.

and that the film cannot be siphoned from conventional television use. Since the film's broadcast availability is assured, Fox argues that a grant of the waiver would add to the diversity of programming available without harm to conventional television and could not possibly injure the public since the film is currently in re-release around the country. Fox also urges that expedited consideration should be given to this petition for waiver since inaction continues to cause "immediate injury" to the producer as it is most desirable that "Butch Cassidy" be programmed on pay cable soon after its theatrical re-release. If action on this request is postponed until the proceedings in *Docket 19554* are concluded, Fox observes that no ruling could be rendered before the first scheduled network exhibition of the film in September 1976 inasmuch as any rules the Commission adopts are likely to be the subject of requests for reconsideration or tests in the appellate courts. Finally, Fox incorporates the arguments that it made along with several other film producers in a "Petition for Immediate Relief" which requested the suspension of the restrictions against the pay cablecasting of feature films and serious-type programs pending the Commission's termination of the proceedings of Docket 19554.[5] This petition, filed a few days before the Commission announced further proceedings in *Docket 19554*, argued that the present rules were unconstitutional, violate the anti-trust rules and exceed the Commission's statutory authority. Moreover, the Commission's failure to decide the issues propounded in *Docket 19554* causes "new and irreparable injury with each passing day." The injury was described as a deprivation of "the program suppliers of the right to sell, the cable systems of the right to exhibit and the public of an opportunity to see highly acclaimed films which have acquired broad popularity."

4. In opposing HBO's petition for waiver, ABC argues that this request to exhibit "Butch Cassidy" should be considered in context of the additional proceedings which were announced for *Docket 19554*. Only with the benefit of further comments and oral presentations should the Commission decide whether the request is basically consistent with the anti-siphoning restrictions of the pay cablecasting rules. Therefore, action on this request should be deferred until *Docket 19554* is concluded since HBO has failed to suggest any "public interest reason or private interest reason" why more prompt disposition is warranted. With respect to the constitutional, anti-trust and copyright arguments mounted by HBO, ABC states that they constitute no more than a collateral attack on the validity of the anti-siphoning rules and are not proper grounds to waive the rules. ABC notes that judicial review of the pay cablecasting rules was never sought and in view of the fact that the subscription television rules were sustained in court, it is likely that a judicial review of the pay cablecasting rules would produce the same results.[6] Turning to Twentieth Century-Fox's support of HBO's request, ABC remarks that any delay in the network exhibition of "Butch Cassidy" is wholly due to the refusal of the film's

[5] This "Petition for Immediate Relief" requested an immediate suspension of Section 76.225(a)(1); its disposition is pending.
[6] ABC has reference to the ruling in *National Association of Theatre Owners* v. *FCC*, 420 F2d 144 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970).

producer to permit an earlier telecast. According to ABC, the sole basis for this waiver request is the private financial interest of the producer. No public interest to waive the rules is given and, hence, no justification exists to grant the relief. Finally, ABC argues that the circumstances under which feature films can be exhibited on pay cable should be left to the provisions of a general rule and not the vagaries of an *ad hoc* proceeding.

B. "Sound of Music"

5. On January 13, 1975, Twentieth Century-Fox filed a petition to waive Section 76.225(a)(1) to permit the pay cablecasting of "Sound of Music" for one month, commencing March 1, 1975. The limited duration of this waiver request is due to the provisions of a licensing agreement which Fox recently concluded with ABC. By the terms of this agreement, ABC can provide one network exhibition of "Sound of Music" during the period of October 1, 1975–April 30, 1976. In addition, the film cannot be exhibited on pay cable less than six months prior to its first television broadcast. As a practical matter, Fox states that the agreement prohibits pay cable exhibition of the film after April 1, 1975. Fox argues that the exhibition of "Sound of Music" on pay cable will not contravene the public's interest in the anti-siphoning rules since such an exhibition cannot prevent or delay the film's exhibition by conventional television in view of its agreement with ABC.

6. Moreover, it is argued that "Sound of Music" would be more than ten years old and thus available for pay cable exhibition but for an "unintended technicality" of the pay cablecasting rules. The film was released as a "road show" on March 2, 1965 and its first "general release" was December 21, 1966. If the age of the film was calculated from its road show release, no waiver would be necessary. However, for the purposes of the pay cablecasting rules, the two to ten years exclusionary period is calculated from the date of the film's general release, i.e., "the first-run showing of a feature film in a theatre or theatres in an area, on a non-reserved-seat basis, with continuous performances." Fox, therefore concedes that exhibition of "Sound of Music" is barred by Section 76.225(a)(1), but contends that these rules were applied to cable television without considering whether the film distribution practices which had caused their initial formulation respecting subscription television had changed with the intervening years. According to Fox, the distinction between a "road show" release and a "general release" was adopted to permit the subscription telecast of a motion picture whose initial availability for subscription use had been delayed because the film was first distributed on a road show or "hard ticket" basis. It is alleged that no films have been theatrically exhibited in this manner since December 1972, and therefore the reasons for the distinction the Commission drew between these forms of theatrical exhibition have been vitiated by actual business practice. As a consequence, Fox argues that the application of the "road show" definition to pay cablecasting is unfair, unduly restrictive and serves no valid public interest purpose.

7. Again in this proceeding, Fox incorporates the arguments it had made in connection with the "Petition for Immediate Relief" discussed above at Paragraph 3. Petitioner also urges expedited action, contending that the pending proceedings of *Docket 19554* should not delay consideration of this matter; otherwise, there can be no decision before the provisions of its agreement with ABC take effect to exclude "Sound of Music" from pay cable.

8. ABC concedes that it cannot say a limited waiver of Section 76.225(a)(1), "under the unique and limited circumstances presented," would have any "significant adverse impact" on its own interests or that it would result in siphoning. However, ABC observes that Fox has demonstrated no "public interest reason" why the Commission should depart from its general regulation and grant the waiver, that no urgency has been shown why a film so widely distributed in ten years and shortly to be available on "free television" should be exhibited on pay cable only through the grant of this request. If the waiver is granted, ABC warns the Commission that many requests for *ad hoc* departure from the provisions of Section 76.225 can be expected. Rather than pursuing a course of *ad hoc* determinations, ABC advises the Commission to protect the integrity of its own processes by denying this request and following the policies laid down in its general rules.

C. Discussion

9. Before turning to the merits of these petitions, we shall briefly address the challenges which HBO and Twentieth Century-Fox have directed at the validity of the rules they wish to have waived. We agree with ABC that these arguments constitute no more than a collateral attack on the present rules which should be litigated in more appropriate forums or proceedings. Moreover, the rules which presently govern pay cablecasting have their antecedents in the subscription television rules, which were sustained as a proper exercise of the Commission's regulatory responsibilities in *National Association of Theatre Owners* v. *Federal Communications Commission, supra.* Following their adoption in the *Memorandum Opinion and Order in Docket 18397*, FCC 70-677, 23 FCC 2d 825 (1970), no judicial tests of the pay cablecasting rules were undertaken, possibly because the Supreme Court had declared the Commission's authority to regulate aspects of cable television service was very broad indeed, provided the rules were "reasonably ancillary to the Commission's jurisdiction over broadcast services." *See, United States* v. *Midwest Video Corp.*, 406 U.S. 649, 669 (1972) and *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968). For these reasons, we believe the objections which HBO and Twentieth Century-Fox have made against the legality of the present pay cablecasting rules must be denied.

10. The feature film anti-siphoning rules which now uniformly apply to both subscription television and pay cablecasting are intended to serve basically two purposes: (a) to assure that feature films shown on the subscription service are of such recency that they are unlikely to appear on conventional television [7], and (b) to avoid competition

[7] *Fourth Report and Order in Docket 11279*, FCC 68-1174, 15 FCC 2d 466, 556.

for the same films between conventional television stations and pay program distributors.[8] To be sure, certain modifications to these rules are being considered in connection with the rulemaking proceedings of *Docket 19554*, but until the Commission decides to modify or alter our present rules, we must weigh petitions for waiver against these purposes. Section 76.225(a)(1) admits of only one exception to its general ban against films falling within the 2–10 year category:

> When a convincing showing has been made that a bona fide attempt has been made to sell the films for conventional television broadcast and that they have been refused; or that the owner of broadcast rights to the films will not permit them to be televised on conventional television because he has been unable to work out satisfactory arrangements concerning editing for presentation thereon or perhaps because he intends never to show them on conventional television since to do so might impair their repetitive box office potential in the future.

Obviously, this exception applies to neither film. Accordingly, to grant a waiver of Section 76.225, we must be satisfied that the purposes this rule is intended to serve will not be frustrated thereby. We have concluded that a grant of either waiver would not serve the public interest and they will be denied.

11. "Butch Cassidy" has been in general release for over five years and thus its exhibition on pay cablecasting is squarely barred by Section 76.225(a)(1). To recapitulate, the reasons urged for waiving the rule are: (a) that the film's telecast on conventional television has been assured; (b) there cannot therefore be any siphoning of the film from conventional television; (c) its exhibition on pay cablecasting will add diversity to the medium; (d) the small size of the potential audience for a cablecast of this film presents no threat to the film's success when shown by ABC. However, most of the feature films produced in recent years have been sold for eventual use by conventional television. If, therefore, we grant a waiver of Section 76.225 and permit the pay cablecasting of "Butch Cassidy," a precedent will have been established which would compel the approval of any number of waivers for films in similar situations. This would tend to undermine the rule and the policies it is intended to serve. Additionally, as we indicated recently, one of our major concerns is not that pay operations will use films and totally deprive conventional broadcasters of their use, but, rather; that the pay use of films will delay their exhibition on conventional television.[9] The agreement between ABC and Twentieth-Century Fox clearly places "Butch Cassidy" in this area of concern. If we permit "Butch Cassidy" to be exhibited on pay cablecasting, there is the possibility that its use by conventional television will be delayed well past its first permitted broadcast run. While the film cannot be siphoned, its availability to a potentially immense audience could be delayed. Until this matter is resolved in *Docket 19554*, it would be unwise to grant a waiver of the rule at the present time.

[8] *Further Notice of Proposed Rule Making and Order for Oral Argument in Docket 19554*, FCC 74–878, 48 FCC 2d 453, 455.
[9] *Further Notice of Proposed Rule Making and Order for Oral Argument, supra*, at 456.

12. "Sound of Music," in view of the limited nature of the waiver that has been requested, is a much more difficult case. We are not persuaded by the thrust of the argument that only an "unintended technicality" requires the film to be treated as one falling within the 2–10 year classification. The distinction we drew between films in general release and those first exhibited on a road show basis was the result of careful deliberations, specifically intended to apply to films distributed in the pattern followed by "Sound of Music's" producers.[10] Apart from this, we are at a loss to discern what compelling public interest will be served if our rule is waived to permit its exhibition on pay cablecasting facilities. The film has been widely distributed through theatrical release over the past ten years and has been seen by millions of people. It will soon be available to millions more over conventional television. The most that can be said for its limited availability over pay cablecasting is that additional revenues will be generated for the film's producers. Since the television public—whether subscribers to cable television or the mass audience dependent on conventional television—will shortly have access to the film without additional cost, we are not persuaded that such a departure from our rules is warranted now.

Finding the public interest will not be served thereby, these petitions requesting a waiver of Section 76.225(a)(1) of the Commission's Rules are denied.

Accordingly, IT IS ORDERED, That the "Petition for Waiver" filed by Home Box Office, Inc., IS DENIED.

IT IS FURTHER ORDERED, That the "Petition for Waiver" filed by Twentieth Century-Fox Film Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

CONCURRING STATEMENT OF COMMISSIONER GLEN O. ROBINSON

I concur in the Commission's decision because the petitions here seem to me, as they do to the Commission, to be simply collateral attacks on the pay cable rules. That emphatically does not mean that I approve of the pay cable rules, which in fact I think are foolish. However, due respect for the Commission's processes tells me that ad hoc waivers are not an appropriate way to change fixed rules.

[10] *See, Fourth Report and Order in Docket 11279, supra*, at 557.

Appendix G

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-2180
Home Box Office, Inc., Petitioner
v.
Federal Communications Commission and
United States of America, Respondents
Professional Baseball
CBS, Inc.
Forward Communications Corporation, et al
American Broadcasting Co., Inc., Intervenors

75-1284
Metromedia, Inc., Petitioner
v.
Federal Communications Commission and
United States of America, Respondents
Professional Baseball
CBS, Inc.
National Association of Broadcasters
Forward Communications Corporation, et al
American Broadcasting Company, Inc., Intervenors

75-1342
Home Box Office, Inc., Petitioner
v.
Federal Communications Commission and
United States of America, Respondents
American Broadcasting Companies, Inc.
Twentieth Century-Fox Film Corp., Intervenors

75-1358
Home Box Office, Inc., Petitioners
v.
Federal Communications Commission and
United States of America, Respondents

CBS, Inc.
Forward Communications Corporation, et al
American Broadcasting Companies, Inc.
Professional Baseball, Intervenors

75-1430

Columbia Pictures Industries, Inc., et al., Petitioners
v.
Federal Communications Commission and
United States of America, Respondents
Professional Baseball
American Broadcasting Co., Inc.
Forward Communications Corporation, et al., Intervenors

75-1496

United Artists Corporation and
Metro-Goldwyn-Mayer, Inc., Petitioners
v.
Federal Communications Commission and
United States of America, Respondents
Professional Baseball
American Broadcasting Co., Inc.
Forward Communications Corporation, et al., Intervenors

75-1555

Motion Picture Association of America, Inc., Petitioner
v.
Federal Communications Commission and
United States of America, Respondents
American Broadcasting Companies, Inc.
Forward Communications Corporation, Intervenor

75-1785

National Association of Broadcasters, Petitioner
v.
Federal Communications Commission and
United States of America, Respondents

75-1788
American Broadcasting Companies, Inc., Petitioner
v.
Federal Communications Commission and
United States of America, Respondents

75-1807
CBS, Inc., Petitioner
v.
Federal Communications Commission and
United States of America, Respondents
National Citizens Committee for Broadcasting, Intervenor

75-1869
National Broadcasting Company, Inc., Petitioner
v.
Federal Communications Commission and
United States of America, Respondents

75-2129
CBS, Inc., Petitioner
v.
Federal Communications Commission and
United States of America, Respondents

75-2130
American Broadcasting Companies, Inc., Petitioner
v.
Federal Communications Commission and
United States of America, Respondents

75-2131
National Association of Broadcasters, Petitioner
v.
Federal Communications Commission and
United States of America, Respondents

75-2172
National Broadcasting Company, Inc., Petitioner
v.
Federal Communications Commission and
United States of America, Respondents

Petitions for Review of Orders of the Federal Communications Commission

Before: WRIGHT and MacKINNON, Circuit Judges and WEIGEL, *District Judge

JUDGMENT

These causes came on to be heard on petitions for review of orders of the Federal Communications Commission and were argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the orders of the Federal Communications Commission insofar as they relate to subscription broadcast television are upheld, subject to a determination of the effect of all *ex parte* pleas and other approaches that were made to the Commission or its employees after the issuance of the first notice of proposed rulemaking in these dockets; said orders in all other respects are vacated; and it is

FURTHER ORDERED AND ADJUDGED by this Court that the record is remanded to the Federal Communications Commission for supplementation in accordance with the Opinion for the Court issued herein this date. The Commission shall file the supplemental record with this Court within 120 days of the date of said Opinion, together with the recommendations concerning the disposition of the subscription broadcast television segment of this review. It is

FURTHER ORDERED AND ADJUDGED by this Court that the Federal Communications Commission shall terminate its proceedings in its Docket 20402, concerning program exclusivity, within 180 days of the date of the aforesaid Opinion for the Court.

Per Curiam
For the Court
George A. Fisher
Clerk

Date: March 25, 1977

Opinion Per Curiam

Concurring Opinion by District Judge Weigel

* Of the United States District Court for the Northern District of California, sitting by designation pursuant to 28 U.S.C. § 292 (d).

Appendix H

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1280 *et al.*

HOME BOX OFFICE, INC. *et al.*, Petitioners

v.

FEDERAL COMMUNICATIONS COMMISSION and UNTED STATES OF AMERICA, Respondents

PROFESSIONAL BASEBALL *et al.*, Intervenors

Before: WRIGHT and MacKINNON, Circuit Judges, and WEIGEL,* District Judge.

ORDER

On consideration of all of the petitions for stay of mandate, for intervention, for rehearing, for rehearing *en banc*, and for other and further relief filed by various parties and of the responses thereto.

On April 18, 1977 National Subscription Television (NSTV) filed with this court a motion for leave to intervene in this proceeding and to file an accompanying petition for rehearing and suggestion for rehearing *en banc*. The grounds given in support of such relief were that NSTV had recently started subscription broadcast television service and faced competition from various pay cable stations which would allegedly enjoy an unfair competitive advantage as a result of our disposition of this case. On the same day the Federal Communications Commission filed a motion for partial stay of mandate in which the Commission indicated, *inter alia*, that it would seek no further review of its pay cable movie rules and asked this court to remand the comparable subscription broadcast television rule 73.643 (a), 47 C.F.R. § 73.643(a), to it so that it could be revoked. This request, and a request that we stay our mandate insofar as it vacates rules 76.225(b)-(d), 47 C.F.R. §§ 76.225 (b)-(d), was renewed in the Commission's opposition to NSTV's motions, the Commission being of the view that the relief it requested would fully protect NSTV.

* Of the United States District Court for the Northern District of California, sitting by designation pursuant to 28 U.S.C. § 292(d) (1970).

The Commission also asked us to stay our mandate insofar as it requires a hearing into *ex parte* contacts. Motions for complete stay of mandate and responses in opposition thereto and in opposition to the requests of the Commission and NSTV have also been filed.

In view of the various petitions before us and the oppositions thereto, we hereby:

(1) Deny the motion of National Subscription Television to intervene in these proceedings.

(2) Stay our mandate insofar as it vacates the Commission's rules codified at 47 C.F.R. §§ 76.225(b)-(d) and insofar as it orders the Commission to hold an evidentiary hearing on *ex parte* contacts; such stay to expire thirty (30) days from the date hereof. Since 15 months may elapse before the Supreme Court can dispose of this matter, the Commission is hereby requested with respect to all those it now believes to have been involved in *ex parte* contacts to obtain written statements from them of their recollections thereof, such statements to include at minimum the names of the persons involved, the approximate dates, times, places, and substance of the communications. Copies of any documents delivered to the Commission, subsequent to the initiation of rulemaking, which documents are not contained in the rulemaking record, shall be attached to the statements.

(3) Remand to the Commission that portion of this case involving the subscription broadcasting rules for the limited purpose of permitting the Commission, should it so desire, to adopt an order repealing 47 C.F.R. § 73.643(a). In granting this remand, we express no view concerning the lawfulness of the course proposed by the Commission, but seek only to remove procedural impediments which might otherwise block Commission consideration of the problems raised by NSTV.

(4) Deny the motions of American Broadcasting Companies, Inc. and National Association of Broadcasters for complete stay of mandate insofar as those motions request relief other than that granted above.

(5) Insofar as other pleadings lodged with us as oppositions themselves constitute motions for further or different

relief, these motions are also denied except to the extent relief has been granted above.

So ordered.

Per Curiam
For the Court
George A. Fisher
Clerk

Appendix I

Communications Act of 1934, 48 Stat. 1064, as amended, 48 U.S.C. 151 et seq.

§ 151. Purposes of chapter; Federal Communications Commission created

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

§ 152. Application of chapter

(a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating to all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone.

§ 153. Definitions

For the purposes of this chapter, unless the context otherwise requires—

(a) "Wire communication" or "communication by wire" means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

(b) "Radio communication" or "communication by radio" means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

§ 307. Licenses; allocation of facilities; terms; renewals

(b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

§ 326. Censorship

Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications of signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

§ 402. Judicial review of Commission's orders and decisions—Procedure

(a) Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 19A of Title 5.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

Nos. 76-1724, 76-1841, 76-1842

FEDERAL COMMUNICATIONS COMMISSION, AMERICAN BROADCASTING COMPANIES, INC., and NATIONAL ASSOCIATION OF BROADCASTERS, *Petitioners,*

v.

HOME BOX OFFICE, INC., et al., *Respondents.*

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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This brief is submitted by respondent cable television companies in opposition to petitions for writs of certiorari filed by the Federal Communications Commission ("FCC"), the National Association of Broad-

casters ("NAB"), and American Broadcasting Companies, Inc. ("ABC").

QUESTIONS PRESENTED

The FCC originally banned from the new medium of pay cable (1) all series-type programs, (2) most motion pictures and (3) thousands of sports events. But, under judicial challenge, the FCC abandoned the heart of its regulatory scheme: it repealed the series ban and renounced the motion picture rule. All that remains are the sports rules and two subsidiary regulations that received scant FCC attention (a ban on advertising and a limitation of the time eligible for movies and sports combined). The court below unanimously invalidated all of the rules, concluding that they exceeded the FCC's jurisdiction, violated the First Amendment, were grossly overbroad, ignored relevant antitrust considerations, were arbitrary, and lacked any record support. The court also found a procedural error—namely, *ex parte* contacts which shaped the rules to insulate broadcasters against potential competition from a new technology.

In these circumstances, the petitions raise the following questions:

1. Since the FCC has now repudiated the major part of its regulatory scheme, should this Court grant certiorari to review the remaining sports and other rules which are just as illegal and arbitrary as the abandoned series and feature film rules?

2. Since all the rules are invalid on the merits for numerous substantive reasons, should this Court grant certiorari to review the procedural *ex parte* question,

particularly since the FCC's challenge is focused on *dictum* in the opinion below which is currently the subject of further consideration by the lower court in another pending case?

3. Since the FCC repudiated the feature film rule, should this Court grant NAB's and ABC's petitions which appear to seek review as to that abandoned rule?

COUNTER-STATEMENT OF THE CASE

Cable television, unlike over-the-air television, has multi-channel capability and is basically supported by subscribers rather than advertisers. It is generally recognized that cable possesses great potential as a national broadband communications system and as an antidote to broadcasting spectrum-scarcity and network dominance.[1] Pay cable uses one or more of the cable channels not devoted to the retransmission of over-the-air television signals to offer subscribers greater diversity—namely, an opportunity to see feature films (unedited, uncut and uninterrupted), live sports events not available on commercial television, and other special programs—all in the comfort of the viewer's home, at a fraction of regular box-office prices, and at more frequent and convenient times than programs offered by commercial television. Pay cable, which began several years ago, now reaches only about

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[1] *See, e.g., Cabinet Committee on Cable Communications, Report to the President* 9-10, 14-16 (1974); *R. Noll, M. Peck & J. McGowan, Economic Aspects of Television Regulation* vii, 183-94 (The Brookings Institution, 1973) (hereinafter "*Noll, Peck & McGowan*"); Hagelin, *The First Amendment Stake in New Technology: The Broadcast-Cable Controversy*, 44 *U. Cin. L. Rev.* 427, 524 (1975).

1% of the more than 70,000,000 homes covered by commercial television.

Nevertheless, the FCC—responding to broadcaster pressures—sought to hobble this fledgling medium at birth by highly restrictive program limitations (A 72, 117).[2] The Justice Department, other government agencies, numerous commentators and public-interest groups, the cable industry and others strongly objected to the FCC's protectionist policies (A 136-43, 147-57, 159-64).[3] The FCC was urged to allow this embryonic medium a chance to develop in a free-market environment in order to permit the public to register its preferences and to gather empirical data upon which to make informed judgments; if problems should eventually arise, there would be ample time to respond to them in an appropriate and legal manner. But instead, the FCC opted for premature and illegal regulations

[2] References preceded by "A" are to the FCC's appendix accompanying its petition.

[3] *See also, e.g., Cabinet Committee on Cable Communications, Report to the President* 34-39 (1974); *Cable Television: Promise Versus Regulatory Performance,* prepared by the Staff for the Subcommittee on Communications of the Committee on Interstate and Foreign Commerce, 94th Cong., 2nd Sess. (Subcommittee Print) 61-70 (January 1976); *Noll, Peck & McGowan, supra* note 1, at vii; *Committee for Economic Development, Broadcasting and Cable Television: Policies for Diversity and Change,* 60-69, 72-76 (1975); *P. MacAvoy, ed., Deregulation of Cable Television* 8-9, 90-91 (1977); *R. Smith, The Wired Nation* 30-32, 45-46 (1972); Hagelin, *The First Amendment Stake in New Technology: The Broadcast-Cable Controversy,* 44 *U. Cin. L. Rev.* 427, 524 (1975); Hoffer, *The Power of the FCC to Regulate Cable Pay-TV: Jurisdictional and Constitutional Limitations,* 53 *Denver L.J.* 477 (1976); Kahn, *Cable, Competition, and the Commission,* 24 *Catholic U.L. Rev.* 854 (1975); Note, *Cable Television and Content Regulation: The FCC, the First Amendment and the Electronic Newspaper,* 51 *N.Y.U.L. Rev.* 133, 138-47 (1976).

which the Justice Department described as an example of the "dismal swamp of protectionism."[4]

Prior Proceedings

In 1969, the FCC ordered cable systems to originate programs on certain channels not used for the carriage of broadcast signals in order to increase diversity for viewers. The FCC also authorized pay cablecasting on non-broadcast channels and rejected proposals for program restrictions which broadcasters claimed were necessary to prevent this nascent medium from "siphoning" programs from commercial television in the future. Such restraints, the FCC concluded, would be improper "unless and until experience gives some indication of a *trend* calling for action in the public interest."[5] But eight months later, as a result of broadcaster pressures, the FCC inexplicably reversed its position although pay cable was not even in existence at the time.[6] Thus, the FCC banned from pay cable all series programs, most motion pictures, thousands of sports events and all advertising; and it also prohibited pay cable from devoting more than 90% of its time to sports and movies combined.[7]

The Justice Department and others sought immediate reconsideration of this unexplained switch in

[4] Reply Comments, Oct. 1974, at 10. (All references to Comments and Reply Comments herein are to filings in FCC Docket 19554.)

[5] *First Report and Order in Docket 18397,* 20 F.C.C.2d 201, 204 (1969) (emphasis added).

[6] *Memorandum Opinion and Order in Docket 18397,* 23 F.C.C.2d 825 (1970).

[7] Similar restrictions had been imposed on over-the-air pay television (STV) (A 27-28).

positions suppressing competition and sensitive First Amendment rights.[8] After a delay of five years, the FCC issued its present *Report and Order*[9] which continued the program restraints on pay cable with certain modifications. The FCC perpetuated its regulatory scheme even though it admitted that, after years of deliberation, it still lacked "a clear picture" as to pay cable's future (A 171). Nevertheless, the FCC theorized that it should act now to avert "potential ill effects of siphoning before they are actually felt" (A 171). But the FCC made no findings that there would be siphoning, now or even in the remote future. Indeed, petitioner ABC now concedes that there is no present prospect of siphoning (Pet. at 15). And CBS' President recently conceded: "Right now, we don't see it [pay cable] as a major threat."[10] The Commission acted on what the court correctly described as "speculation and innuendo" (A 88-89).

Series Programs

The FCC banned series from pay cable if *one* episode had *ever* appeared on commercial television. Shortly after the rule was attacked in court, the FCC repealed the series rule, conceding that "the program

[8] The court below found no explanation for the FCC's "quick reversal" of position (A 30). The FCC now explains that it forgot to "focus" on the issue originally (Pet. at 5).

[9] *First Report and Order in Docket 19554*, 52 F.C.C.2d 1 (A 123-204), *reconsideration denied*, 54 F.C.C.2d 797 (1975) (A 205-18).

[10] *Television Digest*, March 14, 1977, at 2. Similarly, the Justice Department stated that "the factual record before the Commission is barren of any credible evidence that siphoning has happened or more importantly is going to happen." Reply Comments, Oct. 1974, at 6; *cf. Noll, Peck & McGowan, supra* note 1, at 148-49.

siphoning that we have sought to prevent is unlikely to occur" (A 224) and that pay cable operations do not pose "the siphoning threat to series programs that we once though they might" (A 226-27). Thus, after years of suppressing massive amounts of free speech and competition, the FCC suddenly confessed error.

Motion Pictures

The complex motion picture rules—highly restrictive and capricious—were also jettisoned by the FCC. Under the repudiated rules:

> —Pay cable could offer motion pictures, without bureaucratic restriction, *only* within 3 years of theatrical release (A 173, 193)—an arbitrary cut-off date that denied pay cable access to the long-running theatrical "blockbusters" which the FCC conceded were vital to this new medium's success.[11]
>
> —Movies 3-to-10 years old were ineligible for pay cable unless they were under license to commercial television (A 173-74, 193)—a "meaningless"[12] exception because, as the FCC itself conceded, broadcasters traditionally insist on exclusivity against pay cable in film licenses (A 177-178; *see* A 129, 135, 141-42).

[11] *Further Notice of Proposed Rule Making in Docket 19554*, 48 F.C.C.2d 453, 457 (1974). Even films within three years of release can be preempted by network "exclusivity" practices questioned by the court on antitrust and diversity grounds (A 17-18 n. 4).

[12] Testimony of President of CBS at Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary on the Pay-Cable Television Industry, July 8, 1975, at 160-61.

—Post 10-year-old films—despite repeated television exposure—were nevertheless banned from pay cable unless they had not been telecast by commercial television for the prior three years because, the FCC reasoned, if such old films had not been telecast for three years then they must be "undesirable" (A 175-76, 193, 211).

The court below struck down all of these arbitrary and protectionist restrictions on numerous substantive grounds. The FCC acquiesced in this holding. It publicly announced that it would not seek review of the motion picture rules (A 247) [13] and explicitly excluded this issue from its current petition (Pet. at 7 n. 5, 8 n. 10). Indeed, after the opinion below, the FCC's Chairman told a Congressional Committee that the movie rules were not "necessary" after all.[14] He added: "I believe the Commission might well have arrived at the same conclusion about the film rules, even without the *Home Box Office* case, but could not act so long as the case remained undecided." [15] Thus, after years of suppressing massive amounts of free speech and competition, the FCC now cavalierly says it was all a mistake.

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[13] *Also see* FCC Motion For Partial Stay of Mandate, April 18, 1977, at 3; FCC Response to National Subscription Television Motions for Leave to Intervene and Suggestion for Rehearing En Banc, April 22, 1977, at 2; *Notice of Proposed Rule Making in Docket 21311*, 42 Fed. Reg. 34341 (July 5, 1977).

[14] Statement of Richard E. Wiley, FCC Chairman, at Hearings Before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation, Oversight Hearings on Cable Television, June 6, 1977, at 26.

[15] *Ibid.*

Sports

The remaining sports rules, as the court below concluded, are just as illegal and capricious as the repudiated motion picture and series rules. If anything, the sports rules are even more illogical and arbitrary.

Specific Events: Specific events (such as a PGA golf tournament) are banned from pay cable if they have been telecast during any *one* of the prior five years (A 181-82, 193). Accordingly, if a specific event is dropped by commercial television, home viewers would have to wait five years to see that event on pay cable. In the meantime, there would be a total blackout on all media.

Non-Specific Events: Such sports events are divided into four categories: regular season home games, regular season away games, pre-season home games and pre-season away games. The eligibility of such events for pay cable depends on whether 25% or fewer of such events in a particular category were broadcast over commercial television in any *one* of the past five seasons. If fewer than 25% of the events in a category were telecast in *each* of the past *five* years, then the number of games available to pay cable is the number not telecast in the "high-water mark season" (*i.e.*, that season in the past five when the most games were telecast)—even though fewer or no games at all are currently available on commercial television (A 184, 193). On the other hand, if 25% or more of the events in a category were telecast in any *one* of the prior *five* years, then pay cable has access to only *half* the number of remainder games not telecast in the high-water mark season—regardless of the number of games currently being shown on commercial television (A 184,

193-94). Moreover, the arbitrary 50% remainder limitation is subject to a still further arbitrary reduction —if the number of games telecast in the current season is fewer than the number telecast in the high-water mark season, then there must be a *pro rata* reduction in pay cable's use (A 184, 194).

These arbitrary rules go far beyond any concern about possible siphoning. The FCC, in effect, concedes that it wishes to create an exclusive warehouse of sports events for commercial television in the event that broadcasters may want games tomorrow which they have rejected today (A 185). These rules, as noted by the court (A 91), produce the anomalous result that as fewer events are available to viewers on commercial television, fewer events are available to viewers on pay cable.[16]

The FCC significantly failed to explain the arbitrary criteria for the maze of sports rules. Similarly, the present petitions carefully avoid any description of these highly capricious rules. Indeed, the FCC's Chair-

[16] The bizarre impact of the sports rules is illustrated by a concrete example involving the New York Yankees. The Yankees' 81 away games, according to the record below, have the following telecast history: 1970—45; 1971—49; 1972—35; 1973—32; 1974—37; 1975—30. Thus, after an atypical high of 49 games in 1971, the Yankees stabilized at an average of 33 telecasts. Under the basic rule, pay cable would have access to only 16 away games (81 total away games minus the high-water mark of 49 = 32 games: 50% of 32 = 16). But this would then have to be reduced further because Yankee away games in 1975 were 40% below the atypical 1971 high-water mark season. That would give pay cable access to only 10 away games. Thus, although commercial television supported only 30 of the 81 Yankee away games in 1975, pay subscribers would be limited to only 10 games. As a result of FCC regulations, 41 away games—more than 50% of the Yankee away games—would be unavailable to television viewers on any medium.

man recently told a Congressional Committee: "I am not tied to the current sports rules."[17]

Ban on Advertising

In a cryptic paragraph (A 188), the FCC banned all advertising on pay cable. The only reason given by the FCC was that this rule "produced little dissent" (A 188). This rule—which the Justice Department noted had the effect of protecting television from possible competition for advertising[18]—is now relegated to a cursory footnote in the FCC's petition (n. 16).

Ninety Percent Rule

The FCC, in another cryptic paragraph (A 188), ruled that pay cable could not devote more than 90% of its time to motion pictures and sports combined (A 188). The FCC's rationale, unrelated to alleged siphoning, was that this quota might encourage program diversity. The 90% rule is now also relegated to a cursory footnote in the FCC's petition (n. 16).

OPINION BELOW

The pay cable rules were challenged by numerous parties, including the Justice Department even though it was a statutory respondent. The Court of Appeals, in a unanimous opinion (A 1-113), invalidated all of the rules on numerous independent grounds—any one

[17] Testimony of Richard E. Wiley, FCC Chairman, at Hearings Before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation, Oversight Hearings on Cable Television, June 6, 1977, at 39.

[18] Brief of the Justice Department in the Court of Appeals, February 1976, at 15 n. 9.

of which would have been dispositive standing alone. The court concluded that: (1) the FCC far exceeded its "ancillary jurisdiction" over cable television by dictating the programs it could not offer and banning advertising; (2) the rules all violate fundamental First Amendment rights of viewers, pay cablecasters and program suppliers and, moreover, are "grossly" overbroad; (3) the FTC failed even to consider the anticompetitive considerations which it conceded were critical to discharge its public-interest mandate; (4) the rules were all arbitrary and there was no evidence or reasoned analysis, but merely "conjecture and innuendo", to support the FCC's professed concern about the possibility of "siphoning" in the distant future; and (5) there was a procedural irregularity because *ex parte* contacts during the crucial decision making stage appeared to have shaped the FCC's protectionist policy.

REASONS FOR NOT GRANTING CERTIORARI

There is no issue worthy of certiorari. The vestiges of the pay cable rules—like the repudiated rules as to motion pictures and series—are not defensible. They were struck down on the basis of well-established legal principles long approved by this Court. Nor is there any conflict among the Circuits.

(1) Petitioners' claim that the FCC can use the "ancillary jurisdiction" rubric to dictate pay cable's programs and ban advertising defies this Court's landmark opinions in *Southwestern*[19] and *Midwest*[20] and

[19] *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968).

[20] *United States* v. *Midwest Video Corp.*, 406 U.S. 649 (1972).

the Communications Act's basic goals of diversity, free speech and competition.

(2) Petitioners do not refute the court's holding that the program rules and advertising ban all violate fundamental First Amendment principles traditionally protected by this Court. Instead of addressing this Constitutional issue squarely, petitioners resort to academic arguments about the First Amendment status of CATV's carriage of scarce broadcast signals —a matter not germane to the suppression of free speech when cable originates its own programs on nonbroadcast channels. Moreover, petitioners are all significantly silent as to the court's additional holding that the rules are "grossly overbroad" under the First Amendment.

(3) Petitioners are also significantly silent as to the court's holding that the pay cable rules ignore the very antitrust considerations which the FCC repeatedly recognized were essential to resolve in discharging its public interest mandate.

(4) Nor do petitioners refute the court's holding that the FCC acted on the basis of "conjecture and innuendo" rather than evidence or reasoned analysis. Instead, petitioners suggest that the FCC should have *carte blanche* to act on the basis of sheer guesses as to the remote future—even though basic First Amendment rights are at stake and even though the FCC now confesses error as to its past predictions and admits that it still lacks a "clear picture".

(5) Finally, petitioners do not dispute the court's conclusion that *ex parte* contacts during the crucial decision-making process shaped the protectionist rules and violated basic principles of fairness and due pro-

cess. Instead the FCC basically questions the effect of *dictum* in the opinion on other rule-making proceedings—*dictum,* moreover, which is now the subject of further consideration by the lower court in another pending appeal.

I

THE REMAINING PROGRAM RESTRAINTS, LIKE THE REPUDIATED RULES, ARE INVALID FOR THE MULTITUDE OF INDEPENDENT SUBSTANTIVE REASONS GIVEN BY THE COURT

The rules exceed the FCC's "ancillary jurisdiction" over cable television

This Court held in *Southwestern* and *Midwest* that the FCC's jurisdiction over cable television "is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting" (392 U.S. at 178; 406 U.S. at 651). Relying on *Southwestern* and *Midwest,* the court below correctly concluded that the program rules and advertising ban exceeded the FCC's "ancillary jurisdiction" over cable television—particularly because of the FCC's contrary policies as to broadcast entertainment programs; the adverse impact of the rules on First Amendment interests; and the lack of any record support or a cogent public interest rationale for the rules (A 37-56).

In *Southwestern,* while upholding the Commission's authority to limit CATV's importation of distant broadcast signals into a local community to protect new media like UHF and educational stations in conformity with Congressional policies, this Court cautioned: "We express no views as to the Commission's authority, if any, to regulate CATV in other circumstances

or for any other purposes" (392 U.S. at 178). In contrast to *Southwestern,* the FCC here is acting to impede a new medium, and is doing so without "substantial evidence" of any public interest reason warranting such drastic action (*see* 392 U.S. at 177).

In *Midwest*—particularly germane here because it dealt with cable's origination of programs on nonbroadcast channels—this Court upheld rules requiring cable systems to originate programs in order to provide viewers with new outlets of expression for diverse programs (406 U.S. at 667-70). But in this 5-to-4 decision, the Chief Justice's decisive concurring opinion warned:

> "Candor requires acknowledgement, for me at least, that the Commission's position strains the outer limits of even the open-ended and pervasive jurisdiction that has evolved by the decisions of the Commission and the courts" (406 U.S. at 676).

If directing cable systems to originate programs "strains the outer limits" of ancillary jurisdiction, those limits are surely exceeded by dictating what programs not to originate, by imposing quotas on sports and movies, and by banning all advertising. Moreover, the program restrictions here defeat the very goals stressed in *Midwest*—namely, the stimulation of new outlets of expression and the widest diversity of programs from different sources.

The rules frustrate the basic goals of the Communications Act which the Commission is charged with implementing—including free speech, pro-competition and diversity policies. As this Court has long recognized, the FCC's plenary jurisdiction over broadcasting does not give the Commission the power to ban

programs or advertisements on broadcast television (*see Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 396 (1969); *FCC* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 475 (1940)), or to deny entry to new broadcasters because they might compete with entrenched broadcasters for programs or advertisers (*FCC* v. *Sanders Brothers Radio Station*, 473-75 (1940)). Thus, the FCC clearly does not have "ancillary jurisdiction" to impose the present regulations on cable television.

Instead of dealing with these specific issues relevant to the scope of "ancillary jurisdiction", petitioners resort to rhetoric about television programming in general and doomsday predictions that the infant pay cable may someday threaten powerful commercial television. But those far-fetched claims were specifically rejected by the FCC's own opinions (A 44, 225).

The rules violate the First Amendment

The court, like all the commentators, correctly recognized that cable television with its multi-channel capacity is entitled to full First Amendment protection like newspapers (A 77-80).[21] In this connection, the court distinguished cable from broadcasting which

[21] This is the unanimous view of those who have considered this issue. *Weaver* v. *Jordan*, 64 Cal. 2d 235, 411 P.2d 289, *cert. denied*, 385 U.S. 844 (1966); *Cabinet Committee on Cable Communications, Report to the President* 15 (1974); *Sloan Commission, On the Cable: The Television of Abundance* 43 (1971); Hoffer, *The Power of the FCC to Regulate Cable Pay-TV: Jurisdictional and Constitutional Limitations*, 53 *Denver L.J.* 477 (1976); Note, *Cable Television and Content Regulation: The FCC, The First Amendment and the Electronic Newspaper*, 51 *N.Y.U.L. Rev.* 133 (1976); Note, *Cable Television and the First Amendment*, 71 *Colum. L. Rev.* 1008 (1971).

uses public airwaves and suffers from spectrum scarcity and problems of physical interference—unique factors which subject broadcasting to special First Amendment rules. *Compare Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), *with Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974).

The court concluded that all the program rules violated the First Amendment (a) because there was no over-riding public interest reason warranting any interference with free speech and (b) because the rules, in any event, were grossly overbroad in terms of their professed objective (A 75-91). Thus, the court declared:

> "The no-advertising and 90-percent rules clearly violate *O'Brien's*[22] first criterion. Not only do they serve no 'important or substantial . . . interest,' 391 U.S. at 377, they serve no purpose which will withstand scrutiny on this record. The sports and feature films rules fare no better. We have already concluded that the Commission has not put itself in a position to know whether the alleged siphoning phenomenon is a real or merely a fanciful threat to those not served by cable. Instead, the Commission has indulged in speculation and innuendo. *O'Brien* requires that 'an important or substantial governmental interest' be demonstated, however—a requirement which translates in the rulemaking context into a record that convincingly shows a problem to exist and that relates the proferred solution to the statutory mandate of the agency. The record before us fails on both scores" (A 88-89; footnotes omitted).

The court, in addition, concluded that the "rules are grossly overbroad" and that "[e]xamples of this are

[22] *United States* v. *O'Brien*, 391 U.S. 367 (1968).

legion" (A 91). The court declared that the rules were not "closely tailored to the end to be achieved" and thus would cause a "loss of diversity and unnecessary restriction of the First Amendment rights of producers, cablecasters and viewers" (A 89). With respect to the sports rules at issue, the court stated:

> "[I]n some circumstances the sports rules have the anomalous effect of reducing the number of non-specific games that can be shown on cable television at the same time that broadcasters are reducing the number of games they will show. This provision is apparently justified on the ground that it is too difficult to monitor the reasons broadcasters cut back their game schedules and at least some cutbacks might be caused by cable competition. However, this record reveals no reason to think that cutbacks represent siphoning any more than they represent editorial or commercial judgment. Where the First Amendment is concerned, creation of such a rebuttable presumption of siphoning without clear record support is simply impermissible. *Cf. Freedman* v. *Maryland, supra*, 380 U.S. at 58. Other examples could be cited, but this would only belabor points already extensively presented to the Commission" (A 91; footnote omitted).

The FCC's total ban on commercials, moreover, specifically violates this Court's recent opinions recognizing that the First Amendment protects advertisements.[23]

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[23] *Bates* v. *State Bar of Arizona*, 45 U.S.L.W. 4895 (June 27, 1977); *Carey* v. *Population Services Int'l*, 45 U.S.L.W. 4601, 4606-07 (June 9, 1977); *Linmark Associates, Inc.* v. *Township of Willingboro*, 45 U.S.L.W. 4441 (May 2, 1977); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Bigelow* v. *Virginia*, 421 U.S. 809 (1975).

Petitioners do not squarely address the basic First Amendment holding and they totally ignore the question of overbreadth. Instead, they argue that *Black Hills*[24] and several other lower court opinions create a conflict as to whether cable television has greater First Amendment rights than broadcasters. But those cases all dealt with CATV's carriage of scarce broadcast signals and not with cable's origination of its own programs on its multiple non-broadcast channels.[25] Ignoring that critical distinction, petitioners try to lump together cable's retransmission and origination functions—an illogical approach flatly rejected by this Court in *TelePrompTer Corp.* v. *Columbia Broadcasting System, Inc.*, 415 U.S. 394, 405 (1974) ("the reception service" of cable television and its "origination service" are "separate and different operations").[26]

Moreover, although cablecasting is entitled to full First Amendment protection like newspapers, the program rules and advertising ban would be unconstitutional even under this Court's opinions as to the special First Amendment standards applicable to spec-

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[24] *Black Hills Video Corp.* v. *FCC*, 399 F.2d 65 (8th Cir. 1968).

[25] Virtually all of petitioners' citations, moreover, concerned the FCC's rule prohibiting cable from importing distant broadcast signals carrying the *identical* programs being offered to viewers by local broadcasters. Those cases thus did not uphold rules decreasing diversity of programs for viewers or restrictions on origination of non-broadcast programs. Indeed, *Titusville Cable TV, Inc.* v. *United States*, 404 F.2d 1187 (3d Cir. 1968)—cited by the FCC (Pet. at 17 n. 21) and ABC (Pet. at 15 n. 28)—stressed that there were "no direct restrictions in the Commission's regulations which would prohibit petitioners from originating their own programs" 404 F.2d at 1189.

[26] *Accord, National Association of Regulatory Utility Commissioners* v. *FCC*, 533 F.2d 601, 613 (D.C. Cir. 1976).

trum-scarce broadcasting. Thus, while the FCC may pass limited regulations indirectly affecting the programming of broadcasters in certain discrete situations, it surely cannot pass blunderbuss rules banning entertainment programs or advertising or setting arbitrary quotas. *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U.S. 94, 110-11, 116, 120, 127 (1973); *id.* at 146 (Stewart, J., concurring); *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, 396 (1969); *FCC* v. *Sanders Brothers Radio Station,* 309 U.S. 470, 475 (1940).[27] Broadcasters' freedom is abridgeable in only very limited cases (such as fairness in the debate of public issues) in order to promote diversity of viewpoints because of channel scarcity. No such considerations are involved here in connection with broadside rules suppressing massive amounts of entertainment programming on a new medium of multi-channel capability.

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[27] Contrary to its position in this case, the FCC has recently stated:

> "The power to regulate the type and quality of programming is clearly beyond the authority of this Commission. The First Amendment and Section 326 of the Communications Act of 1934 would prevent governmental intrusion into such areas."

Report and Order in Docket 20203, 61 F.C.C.2d 946, 949 (1976) (no regulation of re-run programs in prime time). *Accord, Memorandum Opinion and Order in Docket 20682,* 60 F.C.C.2d 858, 859 (1976) (no regulation of entertainment formats in broadcasting); *Children's Television Report and Policy Statement,* 50 F.C.C.2d 1, 2-3 (1974), *aff'd sub nom. Action for Children's Television* v. *FCC,* No. 74-2006 (D.C. Cir. July 1, 1977), *petition for rehearing pending* (no ban on advertising or program quotas in connection with children's programs); *Memorandum Opinion and Order in RM-2652,* 60 F.C.C.2d 641, 643 (1976) (no prohibition of multiple exposures of more than one episode of the same program in prime time access periods).

Finally, petitioners complain that the court below upheld the FCC's over-the-air pay television rules (STV) in the *NATO case*[28] and left them intact in the current opinion. This is a red herring. In the instant case, nobody directly challenged the STV rules;[29] and, after the opinion below, the FCC decided to conform the STV and pay cable rules.[30] Moreover, in the *NATO* case, the STV service at issue "blacked-out" scarce channels, whereas cable has a multi-channel capability—a critical distinction emphasized by the court (A 75).[31] In any event, the *NATO* appeal—brought by theatre owners to kill STV and not to defend anybody's First Amendment rights—did not deal with the factual basis for the STV rules or the issue of overbreadth. As the court stressed here: "[A]ny assessment of First Amendment gains and losses must be made on the basis of the record in front of us today" (A 77 n. 79). The court below, fully aware of the circumstances involved in *NATO*, correctly distinguished its earlier opinion in that case.

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[28] *National Ass'n of Theatre Owners* v. *FCC,* 420 F.2d 194 (D.C. Cir. 1969), *cert. denied,* 397 U.S. 922 (1970).

[29] One STV aspirant filed, and then withdrew, a petition for review of the STV rules.

[30] FCC Motion for Partial Stay of Mandate, April 18, 1977, at 9-10; FCC Response to National Subscription Television Motions for Leave to Intervene and Suggestion for Rehearing En Banc, April 22, 1977, at 2-3.

[31] The court stated that *NATO* concerned "how to allocate television licenses" and rested on "the scarcity rationale" (A 76, 77 n. 79).

The Commission disregarded relevant antitrust considerations

Pro-competition policies of the antitrust laws are an essential ingredient of the public interest standard of the Communications Act.[32] Here, as the court observed, the FCC "throughout these proceedings found the antitrust issue to be relevant to discharge of its public interest obligation" (A 69). The FCC, for example, asked at the outset of its opinion (A 125-26):

> "Would not the development of a pay system of program distribution help to cut back the network domination of program production and dissemination?"
>
> * * *
>
> "Would the competition provided to conventional television result in an upgrading of the programming found on commercial television?"

But, as the court correctly concluded, the FCC totally ignored the antitrust issues which it admitted were crucial to the discharge of its public interest obligations.[33] Instead, the FCC opted for "hobbling cable television" by "highly restrictive" rules in order to insulate entrenched broadcasters with "monopsony power" against possible future competition (A 65, 72, 117). Significantly, the petitions are all silent on the critical antitrust issue.

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[32] *United States* v. *Radio Corp. of America*, 358 U.S. 334, 351-52 (1959); *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470 (1940).

[33] The court noted that the FCC's entire consideration of the antitrust issues was confined to a single cryptic paragraph which is "obviously flawed" and "completely irrelevant to most of the antitrust issues raised" (A 70). The court declared: "We cannot fathom how the Commission reached the conclusion that the balance here should be struck in favor of regulation" rather than competition (A 70).

The rules are arbitrary and capracious and not based on evidence or reasoned analysis

The court below correctly found that there was no record support or cogent rationale for the rules. There is admittedly no present prospect of so-called siphoning; and if siphoning should ever appear likely, there would be ample time for any action which might be legal and appropriate.[34] The court found that the FCC's professed concern about the possibility of siphoning in the remote future was based—not on facts, probabilities or reasoned analysis—but on "speculation and innuendo" (A 88; *also see* A 60-68). Pointing to the FCC's own admission that it lacked a "clear picture" as to the future, the Court declared:

> "The Commission's lack of a clear picture is directly attributable to its own choice to regulate rather than allow a period of unregulated experimentation in which data could be generated that could form a predicate for informed agency action.
>
> * * *
>
> "In this state of affairs, where there is no evidence of any urgent need for preventive action and where approval of the Commission's position would foreclose the possibility that data could be generated in the future that would allow fully informed decisionmaking, we are disinclined to give the Commission the 'benefit of the doubt' which it argues it should have" (A 61-62 n. 60).

The present petitions do not dispute the lack of evidence or reasoned analysis for the rules. On the con-

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[34] Congress, for example, has shown considerable interest in assuring public access to televised sports in anti-blackout legislation. Act of September 14, 1973, Pub. L. No. 93-107, 87 Stat. 350, 1973 U.S. Code Cong. & Adm. News 4[illegible].

trary, petitioner ABC concedes that pay cable now lacks the "economic capacity to outbid free television for much, if any, of its program attractions" (Pet. at 15).[35]

In the absense of facts or logic, the FCC in effect urges that it should have *carte blanche* to forecast the future even "where there is no concrete supporting evidence" (Pet. at 10, 19-20). But administrative agencies cannot base rules "on pure fantasy, speculation devoid of factual premise."[36] The FCC cannot formulate regulations premised on supposed clairvoyance

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[35] Similarly, NAB recently told Congress that it had no present concern about the siphoning of national sports: "[W]e are not talking about [losing] the World Series or the Super Bowl." Testimony of Vincent Wasilewski, NAB President, at Hearings Before the Subcommittee on Communications of the Senate Committee on Commerce, Science, and Transportation, Oversight Hearings on Television Broadcast Policy, May 10 1977, at 214-15. NAB's concession is understandable because, for example, ABC and NBC, respectively, recently paid $118,000,000 and $80,000,000 for NCAA football games and the next Olympic games. *Broadcasting*, June 20, 1977, at 44; *N.Y. Times*, Feb. 2, 1977, at 1, col. 2; *N.Y. Times*, Feb. 3, 1977, at 67, col. 1. In this connection, the Justice Department stated below: "In view of the relative financial resources of the television and cable industries, and the fact that many television contracts to show sporting events are on a multi-year basis, there does not appear to be any reasonable cause for concern over immediate and large scale siphoning." Brief of the Justice Department in the Court of Appeals, February 1976, at 37-38.

[36] *American Airlines, Inc.* v. *CAB*, 192 F.2d 417, 421 (D.C. Cir. 1951). *Accord*, *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86, 96-97 (1953); *City of Chicago* v. *FPC*, 458 F.2d 731, 742 (D.C. Cir.), *cert. denied*, 405 U.S. 1074 (1972); *Portland Cement Ass'n* v. *Ruckelshaus*, 486 F.2d 375, 391-92 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974); *International Harvester Co.* v. *Ruckelshaus*, 478 F.2d 615, 629 (D.C. Cir. 1973).

when (1) sensitive First Amendment rights are at stake; (2) past FCC predictions in this area have proven false and been renounced; (3) the FCC admits that it still lacks a "clear picture"; and (4) the Commission fails to explain why it did not accept suggestions by the Justice Department and others to allow free-market operations in order to determine if any rules were in fact necessary.[37]

II

PROCEDURAL IRREGULARITIES, BASED ON *EX PARTE* CONTACTS, DO NOT WARRANT CERTIORARI

In addition to invalidating the pay cable rules on the merits for a host of reasons, the court below found a procedural error—namely, *ex parte* contacts which shaped the protectionist rules (A 92-106).[38] Such contacts made the public proceedings a "sham"; "conferred preferential advantages on vast segments of the broadcast industry to the detriment of other competing business interests"; and reflected the "often-voiced claims of undue industry influence over Commission proceedings" (A 96, 97, 119).[39] The court held that these

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[37] This was the approach followed by the FCC in repealing the series ban: "We will monitor future events closely, and stand ready to reimpose series program restrictions should subscription operations threaten to reduce the quantity and quality of series programs now available to the public over conventional television" (A 227).

[38] The court was especially critical of *ex parte* activities by petitioners ABC and NAB (A 94-95), who avoid this issue in their petitions.

[39] The court observed that the FCC engaged in these secret discussions during its decision making deliberations despite its Chairman's public condemnation of such practices (A 96 n. 117, 102 n. 123).

secret contacts not only deprived it of the full administrative record for review,[40] but also violated basic standards of due process and fairness under *Sangamon Valley Television Corp.* v. *United States,* 269 F.2d 221 (D.C. Cir. 1959)—a landmark opinion which was decided after this Court remanded the case to the Circuit Court when this Court learned of *ex parte* contacts in an FCC informal rulemaking proceeding. 358 U.S. 49 (1958)."

The court in *Sangamon* declared that "whatever the proceeding may be called it involved . . . [a] resolution of conflicting private claims to a valuable privilege, and . . . basic fairness requires such a proceeding to be carried on in the open" (269 F.2d at 224). The court below, as in *Sangamon,* remanded for evidentiary hearings to determine the nature of all *ex parte* contacts (A 108, 112). But the remand was limited to the STV rules because the pay cable rules were found to be invalid on the merits on numerous grounds (A 107-08, 112-13).

Significantly, petitioners do not question *Sangamon,* or deny the impact of the criticized *ex parte* contacts on the outcome, or challenge the court's determination that this case involved "conflicting private claims to a valuable privilege." Instead, the FCC attacks *dictum* in the opinion which states that there should be no *ex parte* contacts in *any* informal rulemaking proceeding—even those which do not involve "conflicting pri-

[40] *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402, 419-20 (1971).

[41] The continuing vitality of *Sangamon's* rationale was recognized in the House Report on the Sunshine Act. House Report No. 94-800-Part II, 1976 U.S. Code Cong. & Adm. News 2212, 2228.

vate claims." But the limits of the square holding in this case, as opposed to the *dictum* challenged by the FCC, were emphasized in Judge MacKinnon's special concurrence here (A 117-122) and in a subsequent decision by another panel of the United States Court of Appeals for the District of Columbia Circuit. *Action for Children's Television (ACT)* v. *FCC,* No. 74-2006 (D.C. Cir. July 1, 1977) (Slip. Op. at 29-38), *petition for rehearing pending.* The *ACT* panel agreed with the *ex parte* holding in *HBO* and that it followed *Sangamon.* However, because *ACT* did not involve "conflicting private claims to a valuable privilege" like *Sangamon* and the present case, the *ACT* panel held that the *ex parte* contacts were not improper in that proceeding. In this connection, the *ACT* panel did question *HBO's dictum* that *ex parte* contacts should be prohibited in *all* informal rulemaking proceedings. A petition for rehearing, with a suggestion for *en banc* consideration. has recently been filed in *ACT.*

Since the FCC's arguments are directed at *dictum* and, moreover, that *dictum* is currently under consideration by the D.C. Circuit in *ACT,* the matter is surely not appropriate for consideration by this Court.[42]

In any event, the procedural *ex parte* issue and *dictum* are academic here because the program rules as to pay cable have been struck down on the merits and the FCC has indicated that it will conform the STV rules to whatever requirements are applicable to pay cable.

[42] *See, e.g., Wisniewski* v. *United States,* 353 U.S. 901, 902 (1957): "It is primarily the task of the Court of Appeals to reconcile its internal difficulties."

III

THE PETITIONS OF ABC AND NAB DO NOT RAISE ANY ISSUE WORTHY OF CERTIORARI

Although the FCC abandoned the motion picture rule after the decision below and specifically excluded that matter in its present petition (Pet. at 7 n. 5, 8 n. 10), the broadcast petitioners appear to seek a general review of the opinion below and ABC, in particular, complains that "the Commission [does] not contest the Court's ruling with respect to feature films" (Pet. at 4). This is frivolous. After almost a decade, the FCC was forced to drop the protectionist motion picture rule. Since the administrative agency has now in effect confessed error, the issue is moot.

CONCLUSION

The Commission's massive prior restraints on programs—illegal and protectionist—have impeded a struggling new communications medium and deprived the American public of freedom of choice and an opportunity for greater diversity. A five-year regime of such bureaucratic restraints in sensitive free-speech areas is indefensible. The remaining pay cable rules—like the repudiated ones—should be put to an end immediately.

For all of the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted,

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Nos. 76-1724, 76-1841 and 76-1842

In the Supreme Court of the United States

OCTOBER TERM, 1977

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

HOME BOX OFFICE, INC., ET AL.

AMERICAN BROADCASTING COMPANIES, INC., PETITIONER

v.

HOME BOX OFFICE, INC., ET AL.

NATIONAL ASSOCIATION OF BROADCASTERS, PETITIONER

v.

HOME BOX OFFICE, INC., ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (FCC App. 1-122)[1] is not yet reported. The orders of the Federal Communications Commission (FCC App. 123-234) are reported at 52 F.C.C. 2d 1, 54 F.C.C. 2d 797, and 35 P&F Radio Reg. 2d 767.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 1977 (FCC App. 243-246). The petition in No. 76-1724 was filed on June 4, 1977, and the petitions in Nos. 76-1841 and 76-1842 were filed on June 23, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2350.

QUESTIONS PRESENTED

1. Whether the administrative record provides a rational basis for the Federal Communications Commission's regulations restricting the program material that may be offered in subscription cablecasting ("pay cable") service.

2. Whether, in adopting regulations that confer valuable commercial advantages on conventional broadcast television by defining the conditions under which pay TV and pay cable service may be authorized, officials of the Federal Communications Commission were required to avoid *ex parte* communications concerning the proposed rules during the informal

[1] "FCC App." refers to the Appendix in No. 76-1724.

rulemaking proceedings, or to make such communications part of the public rulemaking record so as to permit public comment on the private representations.

STATUTE AND REGULATION INVOLVED

Sections 1, 2(a), 3(a) and (b) of the Communications Act of 1934, 48 Stat. 1064-1065, as amended, 47 U.S.C. 151, 152(a), 153(a) and (b), are set forth at FCC App. 251-252. The subscription cablecasting regulations, 47 C.F.R. 76.225, and the subscription television regulations, 47 C.F.R. 73.643, are set forth at FCC App. 227-234.

STATEMENT

After thirteen years of study, the Federal Communications Commission in 1968 issued regulations restricting the kinds and quantity of programming that could be broadcast by subscription television operators ("STV or pay TV").[2] *Fourth Report and Order*, 15 F.C.C. 2d 466. Those regulations prohibited such operators from broadcasting certain feature films, certain sports events, and "series type" programs. In addition, no more than 90 percent of STV programming could consist of feature films and sports events, and no commercial advertising could be shown. *Id.* at 597-598. The Commission reasoned that the scarce radio spectrum space to be used by STV should

[2] STV involves the use of the radio spectrum to broadcast a scrambled television signal which, on payment of a fee, subscribers are authorized to unscramble by use of a device attached to their television set (FCC App. 124, ¶ 3).

not carry the same material already shown on commercial broadcast television, but should instead enlarge the diversity of programming available to the public. *Id.* at 556, ¶ 284 and 566, ¶ 313. Moreover, the Commission feared that if pay TV stations were permitted to show feature films, sports events, and offer series-type programming, those formats would not be available for viewing on "free" conventional broadcast television. The Court of Appeals for the District of Columbia Circuit upheld the restrictions against a First Amendment challenge on the ground that the restrictions were justifiable under the Commission's responsibility to regulate the radio spectrum. *National Association of Theatre Owners ("NATO")* v. *Federal Communications Commission*, 420 F. 2d 194 (C.A.D.C.), certiorari denied, 397 U.S. 922.

In the meantime, the Commission had initiated a new inquiry into the role cable television systems could play in national communications. *Notice of Proposed Rulemaking*, 15 F.C.C. 2d 417. That proceeding resulted, *inter alia*, in regulations requiring that cable systems distributing broadcast television signals ("CATVs") must also engage in "cablecasting" by originating programs and by setting aside channels for public access.[3] Unlike CATV service, cablecasting does not use radio signals.[4] At that time the Commission declined to extend the STV programming restrictions to cablecasting. It found that such restrictions were not necessary to protect the public interest in broadcasting and thus would not be appropriate "unless and until experience gives some indication of a trend calling for action in the public interest." *First Report and Order*, 20 F.C.C. 2d 201, 204. Less than a year later, however, without explaining the change in policy, the Commission in 1970 imposed restrictions upon "pay cable" that were nearly identical to those imposed on STV. *Memorandum Opinion and Order*, 23 F.C.C. 2d 825.

2. In 1972 the Commission denied petitions for reconsideration of its pay cable format restrictions, but nevertheless opened a new docket to reconsider the rules.[5] More than 140 comments addressing the propriety of program fare restrictions on pay cable were submitted in the proceedings (FCC App. 130, ¶ 23). Ruling that STV and pay cable should be uniformly regulated, the Commission amended the STV rules, and extended to pay cable offered by CATVs identical format restrictions. *First Report and Order*, 52 F.C.C. 2d 1 (FCC App. 123-204), modified, *Second Report*

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[3] These regulations were sustained in *United States* v. *Midwest Video Corp.*, 406 U.S. 649. The Commission's jurisdiction to regulate the distribution by CATVs of television broadcast signals was sustained in *United States* v. *Southwestern Cable Co.*, 392 U.S. 157.

[4] Pay cable involves the closed-circuit cable distribution of programming for which the subscriber is charged an additional per program or per channel fee beyond the regular monthy fee charged for the basic cable TV service.

[5] *Notice of Proposed Rule Making and Memorandum Opinion and Order*, 35 F.C.C. 2d 893, 896.

and Order, 35 P&F Radio Reg. 2d 767 (FCC App. 219-234).

The rules, as finally modified (FCC App. 219-234), prohibited exhibition by pay cable (47 C.F.R. 76.225), or STV (47 C.F.R. 73.643), of (1) feature films more than three but less than 10 years old (unless under contract to and available for showing by commercial television or unless foreign without subtitles or dubbing); (2) particular sports events (*e.g.*, Super Bowl, World Series, Kentucky Derby) shown on broadcast television within the previous five years; and (3) more than a certain number of certain other sports events (*i.e.*, regular season with pre-scheduled participants), with the number to be determined by reference to several factors.[6] The rules also required that no more than 90 percent of total cablecasting hours, on a yearly basis, could consist of feature films and sports events. Finally, the rules prohibited commercial advertising during and between pay cable programs (FCC App. 227-234).[7]

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[6] The factors to be considered were: whether the games are home or away, pre-season or season; whether broadcasters carried more or less than 25 percent of the games in the previous five years; a percentage of games not broadcast; and a "high-water mark season" factor. For a demonstration of how the number of non-specific sports events available to pay cable would be calculated, see Brief in Opposition of Respondents Home Box Office, *et al.*, p. 10 n. 16.

[7] As adopted in the *First Report and Order, supra* (FCC App. 194), the rules had also barred the distribution to subscribers of all series programs (*i.e.*, programs with interconnected plot or substantially the same cast of principal characters). The series prohibition, however, was subsequently re-

The Commission concluded that the public interest required such restrictions in order to preserve for "free" broadcasting the types of mass appeal programming upon which it currently relies (FCC App. 164-165, ¶¶ 144-145, and 171, ¶ 161). It expressed concern that if STV and pay cable were permitted unrestricted access to films and sports events, subscription operations would "siphon off" such programming by outbidding "free" conventional broadcast television for these rights. This, it feared, would (1) foreclose the showing on conventional television of these popular formats in areas not reached by subscription operations, and (2) deny such programming to those too poor to afford it.

3. Some fifteen parties petitioned for review of the Commission's orders.[8]

The court of appeals, in a lengthy *per curiam* opinion (FCC App. 1-122), sustained amendments to the STV regulations (47 C.F.R. 73.643) but remanded those rules to the Commission for consideration of the effects of extensive *ex parte* contacts which, the court found, may have tainted the proceedings. However,

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voked by the Commission in its *Second Report and Order, supra* (FCC App. 219-234).

[8] The United States, as statutory respondent, opposed the Commission in the court of appeals. It contended that, as applied to all-cable service, the anti-competitive consequences of the restrictions had not been justified by record evidence under the public interest standard the Commission must apply; and that the considerations that justify restrictions on pay TV—effective use of scarce broadcast frequencies—were inappropriate to all-cable service.

the court vacated the pay cable rules as arbitrary, capricious and unlawful on the record before it.

The court held that the Commission had exceeded its jurisdiction to regulate cable television under the standards of *United States* v. *Midwest Video Corp.*, 406 U.S. 649, 667-668, and *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 173-176, for two principal reasons: because the record did not show that the objectives to be achieved by imposing restrictions on the program material which may be cablecast are also objectives for which the Commission could legitimately regulate the broadcast media; and because the Commission had failed to show that the harm which its regulations seek to remedy actually exists (FCC App. 37-56).

The court reasoned that since the Commission denies that it has authority to regulate the program format of conventional broadcasters, it cannot regulate the programming of cable casts that do not use the radio spectrum (FCC App. 45-52). It also found that the no-advertising rules and 90 percent limitation on feature films and sports events, adopted to confine cablecasting to a role supplemental to conventional broadcasting, were unjustified because such restrictions were not necessary to assure diversity in use of the crowded radio spectrum (FCC App. 54-56). Insofar as the Commission sought to prevent "siphoning" of program material from conventional television, the court found that the record failed to show that "siphoning" will actually occur or that programming would be withdrawn from the poor (FCC App. 52-56,

61-68). It further found that the record did not disclose the factual grounds upon which the Commission had purported to balance the effects of competition between cablecasters and broadcasters for program material against any established need for restrictive regulation of all-cable programming (FCC App. 75).

In addition, the court held that under the First Amendment, restrictions on the material that may be shown to cable subscribers can be justified only to the extent necessary to assure the right of the viewing public to have access to the various kinds of programming. But, it found, the present record failed to show grounds for such a restriction on cablecasters, or for limiting the audience that program-suppliers and advertisers may address. The regulations were also found to be more restrictive than necessary (FCC App. 75-91).

The court upheld the amendments to the subscription television rules on the basis of its 1969 decision in *NATO*, *supra* (FCC App. 108-112).

Finally, the court found that the pay cable and subscription television rules may have been tainted by *ex parte* contacts, particularly during the period between the close of oral argument on the rules and the adoption of the Commission's first report and order in March 1975 (FCC App. 92-108). The majority held (*ibid.*) that in informal rulemaking, all *ex parte* contacts concerning the proceedings should be prohibited once a notice of proposed rulemaking has been issued, unless the substance of such contacts is incorporated into the public file of the rulemaking

docket.[9] Since the court had completely vacated the cable restrictions, however, it gave no further consideration of the effect of its *ex parte* ruling on those rules.[10] Applying *Sangamon Valley Television Corp.* v. *United States*, 269 F. 2d 221 (C.A.D.C.), however, the court remanded the record to the Commission with instructions to conduct an evidentiary hearing concerning the effect of the *ex parte* contacts on the STV amendments (FCC App. 108).

In seeking a stay subsequent to the court of appeals' decision, the Commission determined "that it would seek no further review of its pay cable movie rules and asked [the court of appeals] to remand the comparable subscription broadcast television rule * * * to it so that it could be revoked" (FCC App. 247). The court of appeals granted this motion and stayed its mandate insofar as it vacated the Commission's regulations (47 C.F.R. 76.225(b), (c) and (d)) restricting the cablecasting of sports events, requiring that not more than 90 percent of the total pay cable programming hours consist of feature films and sports events combined, and forbidding commercial advertising announcements during pay cablecasts (FCC App. 247-249).

[9] Judge MacKinnon, in a subsequently issued concurrence (FCC App. 117-122), stated that such a requirement was proper in this case because the rules involved the competitive grant of valuable business advantages. He would not apply the majority's standard to informal rulemaking not involving such matters.

[10] The court's decision concerning the failure of the present record to meet the requirements of *Southwestern Cable* and *Midwest Video* expressly noted that following remand the Commission might meet those requirements on a proper record (FCC App. 56). Since the CATV regulations were vacated, the court apparently assumed that if a new CATV proceeding were initiated, it would be conducted without *ex parte* contacts.

ARGUMENT

1. Since the Commission has abandoned the feature film restriction, petitioners seek review of the court of appeals' decision only insofar as it vacates the pay cable regulations (47 C.F.R. 76.225 (b), (c) and (d)) (FCC App. 232-234) restricting the sports events which may be cablecast, requiring that not more than 90 percent of cablecast programming hours consist of feature films and sports events combined, and prohibiting commercial advertising in connection with pay cable. (See Statement, *supra*, p. 10.) We submit that on this record there is no reason for further review of the Commission's truncated restrictions.

1. *a.* The court of appeals' decision clearly leaves open to the Commission the option of developing an adequate record. Its decision concerning the Commission's jurisdiction to restrict the programming materials available to cablecasters expressly noted (FCC App. 56):

> We do not hold that the Commission must find express statutory authority for its cable television regulations. * * * However, we do require that at a minimum the Commission, in developing its cable television regulations, demonstrate that the objectives to be achieved by regulating cable tele-

> vision are also objectives for which the Commission could legitimately regulate the broadcast media. Where the First Amendment is involved, more will be required. * * * Further, we require that the Commission state clearly the harm which its regulations seek to remedy and its reasons for supposing that this harm exists. Because our holding is so limited, it is possible that the Commission will, after remand, be able to satisfy the jurisdictional prerequisites for regulating pay cable television.

b. Although petitioners contend that the court of appeals has applied erroneous jurisdictional, evidentiary and First Amendment standards, it is evident that the court of appeals' ruling rests upon the inadequacy of the evidence in the record, and of the Commission's assessment thereof, to support the restrictions the Commission has imposed on what cablecasters may exhibit to their subscribers.

Petitioners do not dispute the court of appeals' observation that "the Commission may only exercise authority over cable television to the extent 'reasonably ancillary' to the Commission's jurisdiction over broadcast television" (FCC App. 38). See *United States* v. *Midwest Video Corp.*, 406 U.S. 649, 670; *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 178. Under this standard, the test is whether the Commission's regulation of cable services would " 'further the achievement of long-established regulatory goals in the field of television broadcasting.' " *Midwest Video Corp., supra*, 406 U.S. at 654, 667-668 (opinion of Brennan, J.). See also *Southwestern*

Cable, supra, 392 U.S. at 172-178. The cablecasting rules do not involve a service that uses any part of the radio spectrum. Cablecasting does not extend television signals outside the system of broadcast channel allocations developed by the Commission as in *Southwestern Cable.* Nor does the Commission here assert "that subscription cable television will divide audiences and revenues available to broadcast stations in such a manner as to put the very existence of these stations in doubt" (FCC App. 44). Moreover, since these rules operate to restrict cablecasting service, rather than to require that this service be established or expanded, the rules do not contribute to the diversification of programming available to television and cable audiences. Cf. *United States* v. *Midwest Video Corp., supra*, 406 U.S. at 668-670.

Instead, the purpose of the rules is simply to prevent competition by cablecasting for material likely to be shown on conventional advertiser-supported television. But, as the court of appeals noted, neither the Commission's decision nor the evidence in the record shows how this purpose furthers any legitimate goal of the Communications Act (FCC App. 43). Insofar as the Commission contends that it is authorized to regulate program format and content to maintain present levels of public enjoyment on "free" television, the Commission's position is inconsistent with its own expressed view that it has no power to require broadcasters, which are not common carriers, to obtain Commision permission before commencing particular program formats. *Memorandum Opinion and Order*, 60 F.C.C. 2d 858.

Even if it is assumed that the danger of siphoning justifies exercise of regulatory powers over cablecasting greater than those that the Commission can exercise over broadcasting (cf. *Midwest Video Corp.*, *supra*, 406 U.S. at 681, Douglas, J., dissenting), the record here does not support the Commission's conclusion. For, as the court of appeals noted, it does not contain evidence showing that particular program formats are sufficiently unique to be unavailable to conventional broadcasting if they are first shown by cablecasts. Nor does it contain data indicating public preference for the formats the rules seek to reserve to conventional broadcasting (FCC App. 49-52). Thus, insofar as the Commission contends that its anti-siphoning rules are necessary because cable television will in the foreseeable future serve only a limited audience and not constitute a nationwide communications service (see Section 1 of the Communications Act, 47 U.S.C. 151), the record does not show how distribution of materials to the limited cable audience in a particular area will forestall broadcast of that same material by television stations in markets not served by the cable system. The court of appeals properly rejected the mathematical models submitted by some networks to prove the likelihood that "siphoning" will occur, because they relied upon non-comparable data: *i.e.*, projections of cablecasters' nationwide income in comparison to historical expenditures by broadcast networks. The data also disregarded the possibility that conventional television may enjoy profits that enable it to pay more for feature films and sports

material than it presently pays (FCC App. 61-66). Moreover, the record does not show that "siphoning" would deny free broadcast programming to the poor, since the only consequence of a first showing of material by cablecasters in an area is that subsequent broadcast showings might be delayed (see FCC App. 66-67). In sum, the need for the anti-siphoning rule has not been demonstrated on the record.

Similarly lacking adequate evidentiary support are the no-advertising rule and the requirement that no more than 90 percent of subscription cable service be devoted to feature films and sports events. The Commission did not evaluate these rules in terms of the nature of cablecasting service. Instead, they were mechanically extended to that service, after they had previously been applied to subscription broadcast television, in order to assure that pay TV would be confined to a supplemental role (FCC App. 54-55). But such an approach ignores the fact that the Commission's power over pay TV rests upon its responsibility to allocate scarce spectrum resources (*NATO*, *supra*). This rationale is wholly inapplicable to cablecasting, which does not use the radio spectrum, and which has an abundance of channels available to increase the diversity in services available to the public (FCC App. 54-56). The no advertising rule, moreover, is apparently inconsistent with the Commission's expressed concern for assuring services to the poor, because the rule effectively bars cable firms from offering advertising that could lead to a reduction in pay cable subscription charges.

In addition to the foregoing inadequacies, the record did not disclose the grounds upon which the Commission balanced the desirable effects of increased competition between the cable and television industries against any adverse consequences of that competition which might justify regulation. The regulation could not be justified to prevent "unfair competition" by cablecasters. Under the new copyright law cablecasters and broadcasters alike will pay royalties for copyrighted material, including rebroadcast of TV signals. Pub. L. 94-553, Section 111, 90 Stat. 2550-2558. Moreover, insofar as non-copyrighted material like sports events is involved, there is no evidence that cablecasting competition threatens fragmentation of audiences that might destroy conventional television.

The court of appeals' analysis of the First Amendment issue similarly turns upon the inadequacy of the record to support governmental restrictions upon what cablecasters may offer to their subscribers. Cablecasting restrictions that effectively suppress the right of the public to hear and of producers to speak cannot be justified on the ground that they are necessary to prevent abuse of the radio spectrum. Cablecasting does not use the radio spectrum and cable operators are not licensees of a scarce and valuable public resource. The rationale of *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, and of the *NATO* case, *supra*, therefore, cannot be extended to cablecasting. The court of appeals carefully recognized, however, that "[t]he absence in cable television of the physical re-

straints of the electromagnetic spectrum does not * * * automatically lead to the conclusion that no regulation of cable television is valid" (FCC App. 81). It correctly recognized that neutral regulations that do not seek to promote any point of view may be adopted to promote the right of the public to hear. See *Red Lion*, *supra*. But the record supporting such restrictions must show that they are justified by an important governmental interest. Cf. *Capital Broadcasting Co.* v. *Mitchell*, 333 F. Supp. 582 (D. D.C.), affirmed *sub nom. Capital Broadcasting Co.* v. *Acting Attorney General*, 405 U.S. 1000.

In this case, the record discloses no justification whatever for the Commission's no-advertising rule suppressing commercial speech in subscription cablecasts. See p. 15, *supra*. Cf. *Linmark Associates, Inc.* v. *Township of Willingboro*, No. 76-357, decided May 2, 1977; *Bates* v. *State Bar of Arizona*, No. 76-316, decided June 27, 1977. The same defect undermines the 90 percent restriction on the exhibition of feature films and sports material. As the court of appeals noted, "given the abundance of channels that cable systems can carry, plus the Commission's rules requiring governmental, educational, and public access channels on every cable system carrying broadcast signals, we do not understand the need to restrict feature film and sports programming time to create the technical conditions for diversity. Without further explanation of the function these rules are meant to serve, we cannot affirm the Commis-

sion's authority to promulgate them" (FCC App. 55-56; footnote omitted).

Insofar as the Commission contends that "siphoning" is the real problem, its argument is undermined by its own action withdrawing its regulations restricting the feature film material which cablecasters may show (see *supra*, pp. 10-11). And the record does not show a significant danger of siphoning with respect to the display of sports events (see *supra*, pp. 14-15). Moreover, measured against the problems which the Commission sought to resolve, the rules were far more restrictive than necessary and were therefore invalid on the ground that they "are grossly overbroad" (FCC App. 91). Thus, "the sports rules have the anomalous effect of reducing the number of non-specific games that can be shown on cable television at the same time that broadcasters are reducing the number of games they will show. * * * [T]his record reveals no reason to think that cutbacks represent siphoning any more than they represent editorial or commercial judgment. Where the First Amendment is concerned, creation of such a rebuttable presumption of siphoning without clear record support is simply impermissible" (*ibid.*; footnote omitted). Cf. *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 124.

Petitioners broadly argue that the standards applied by the court of appeals require a degree of evidentiary support unsuited to the predicted estimates of harm which the Commission must undertake in adopting policies for the future. But even

prediction must rest upon a rational basis, lest it become sheer speculation. Petitioners do not demonstrate that the record sets forth evidentiary support for their broad legal contentions. Without such support, they are seeking only an abstract advisory opinion from this Court.

2. The Commission also seeks review of the court of appeals' holding that its cablecasting and subscription television rules may have been tainted by *ex parte* contacts. The Commission, however, does not contest Judge MacKinnon's concurring statement that "the rulemaking undeniably involved competitive interests of great monetary value and conferred preferential advantages on vast segments of the broadcast industry to the detriment of other competing business interests" (FCC App. 119). Because the rules have this characteristic and in effect define the conditions under which STV and pay cable service may be authorized, they were held to be subject to the same standards as those applied to the award of licenses and other valuable privileges. It has long been held to be inconsistent with fundamental administrative fairness for the Commission to entertain *ex parte* submissions, outside the context of the public rulemaking record, in proceedings relating to such subject matter. See *Sangamon Valley Television Corp.* v. *United States*, 269 F. 2d 221 (C.A.D.C.).

The opinion's broad statement that *ex parte* contacts should be barred in all rulemaking under 5 U.S.C. 553(b) once a notice of public rulemaking has been published need not be reviewed by this Court on

this record. The STV rules have been sustained subject to reexamination by the Commission of the effects of *ex parte* contacts. For the reasons set forth above, that reexamination is narrowly based and does not warrant review by this Court. The cablecasting rules were vacated on other grounds. As to them, if the Commission decides to conduct a new rulemaking, the majority's broad statement would simply be an appellate precedent to be considered in that rulemaking with other authorities discussing rulemaking procedure. The majority's broad statement does not appear to be the law of the circuit. It was joined only by one judge of the circuit and a district judge sitting by designation. In a subsequent decision, the court of appeals held that undisclosed *ex parte* contacts during the public comment stage of informal rulemaking were not prohibited in rulemaking that did not involve "'competing claims to a valuable privilege.'" *Action for Children's Television* v. *Federal Communications Commission*, C.A.D.C., No. 74-2006, decided July 1, 1977, slip op. 37. The panel in that case consisted of three circuit judges. Any differences among the judges of the District of Columbia Circuit concerning the appropriate standard for *ex parte* contacts in informal rulemaking should be initially resolved by that circuit on an appropriate record. See *Wisniewski* v. *United States*, 353 U.S. 901, 902.[11]

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[11] On August 24, 1977, the court of appeals denied a petition for rehearing with a suggestion for rehearing *en banc* in *Action for Children's Television, supra*, addressed to the *ex parte* issue.

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1977.

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No. 76-1724
FEDERAL COMMUNICATIONS COMMISSION, *Petitioner*
v.
HOME BOX OFFICE, et al., *Respondents*

No. 76-1841
AMERICAN BROADCASTING COMPANIES, INC., *Petitioner*
v.
HOME BOX OFFICE, et al., *Respondents*

No. 76-1842
NATIONAL ASSOCIATION OF BROADCASTERS, *Petitioner*
v.
HOME BOX OFFICE, et al., *Respondents*

OPPOSITION OF RESPONDENT NATIONAL CITIZENS COMMITTEE FOR BROADCASTING TO PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

Supreme Court of the United States

No. 76-1724

FEDERAL COMMUNICATIONS COMMISSION, *Petitioner*

v.

HOME BOX OFFICE, et al., *Respondents*

No. 76-1841

AMERICAN BROADCASTING COMPANIES, INC., *Petitioner*

v.

HOME BOX OFFICE, et al., *Respondents*

No. 76-1842

NATIONAL ASSOCIATION OF BROADCASTERS, *Petitioner*

v.

HOME BOX OFFICE, et al., *Respondents*

OPPOSITION OF RESPONDENT NATIONAL CITIZENS COMMITTEE FOR BROADCASTING TO PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Respondent National Citizens Committee for Broadcasting (NCCB) respectfully urges this Court not to issue a writ of certiorari to the United States Court

of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals appears at FCC App. 1-115,[1] with the special concurring opinion of Judge MacKinnon at App. 117-122. It reversed and remanded the FCC's First Report and Order in *Subscription TV Program Rules,* 52 F.C.C. 2d 1, *reconsideration denied,* 54 F.C.C. 2d 794 (1975), which appears at FCC App. 123-218.

JURISDICTION

This Court's jurisdiction has been invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly found that there was no support in the record for the Commission's rules restricting film and sports programming presented over cable systems also carrying broadcast signals, and that these and related rules were arbitrary and violative of the First Amendment.

2. Whether the Court of Appeals correctly found that in a proceeding allocating valuable privileges among competing private parties, the Commission's procedures were flawed because the Commission violated its own rules and basic fairness by allowing *ex parte* presentations, and that these private discussions, particularly in the final decisional phase, made a sham

[1] References to the FCC's Petition or Appendix will be cited as "FCC Pet." or "FCC App."

of the public proceedings and resulted in a failure to have the full administrative record before the reviewing court.

STATUTES INVOLVED

Pertinent provisions of the Communications Act of 1934, as amended, are set forth in FCC App. I, pp. 251-252.

Section 553 of the Administrative Procedure Act is appended to this Opposition.

COUNTER-STATEMENT OF THE CASE

1. The Proceedings Leading to the FCC's 1975 Decision.

In 1969, the Commission issued a First Report and Order, finding that there should be no restrictions on program originations on cable.[2] Upon petitions for reconsideration filed by broadcast interests, the Commission imposed very restrictive rules allegedly to prevent pay cable from "siphoning off" programming presented over commercial TV.[3] The procedural and substantive propriety of this action was challenged by a number of parties, including the Department of Justice, in petitions for reconsideration. After two years delay, the Commission simply instituted a new proceeding (Docket No. 19554) but kept the restrictive rules in effect.[4]

[2] CATV, First Report and Order in Docket No. 18397, 20 F.C.C. 2d 201, 202, 205 (1969).

[3] CATV, Memorandum Opinion and Order in Docket No. 18397, 23 F.C.C. 2d 825 (1970).

[4] Cablecasting—Program Charges, Notice of Proposed Rule Making and Memorandum Opinion and Order, 35 F.C.C. 2d 893 (1972); FCC App. 18-19, n. 5; 30-32, n. 27.

In early 1974, the Commission, under then Chairman Burch, sought to complete action in the proceeding.[5] Because the Commission was "leaning" in its deliberations towards relaxing the existing rules, "with 'wildcard' rights for 'blockbuster' movies,"[6] American Broadcasting Companies' representatives contacted "key members of Congress", who in turn successfully pressured the Commission not to take such action.[7]

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[5] See *Television Digest*, March 4, 1974, pp. 1-2; *Broadcasting Magazine*, March 4, 1974, p. 6; *Television Digest*, February 18, 1974, pp. 1-2; *Broadcasting Magazine*, March 11, 1974, p. 5; FCC App. 94.

[6] *Television Digest*, March 4, 1974, p. 2; FCC App. 94. The "wildcard" provision would mean that cable or pay entrepreneurs could present a specified number of movies without regard to any restriction.

[7] *Ibid.* (Senators' ". . . action . . . was prompted by Hill visit by ABC Chmn. Leonard Goldenson and Pres. Elton Rule, whose only goal was to put halter on relaxation of pay-cable rules. . ."); *Broadcasting Magazine*, March 4, 1974, p. 6. See Remarks by Mr. Everett H. Erlich, Senior Vice President and General Counsel, ABC, before the ABC Television Network Affiliates, Los Angeles, May 10, 1974, p. 1:

> . . . As most of you know, the FCC just prior to Chairman Burch's sudden departure was on the verge of modifying Pay-TV rules applicable to movies by loosening the 2 and 10-year limitations. They were also considering adopting a so-called 'wild card' exception for 12 to 18 pictures a year which would have exempted entirely the most popular features from the application of any rule. We took the leadership in opposing these proposals with the result that key members of Congress made it known in no uncertain terms that they did not expect the Commission to act on such a far-reaching policy matter without a full complement and without first getting congressional guidance. The Commission got the message and has postponed for several months reconsideration of this particular issue.

See also Hearings before Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, on the Pay-Cable Television Industry, July 8, 1975, pp. 357-59 (testimony of Mr. Erlich); May 21, 1975, pp. 29, 41-42 (testimony of NCTA President David Foster). FCC App. 94.

The Commission then issued a further notice, calling for still more comments and another oral argument in October 1974.[8] In later 1974, the amicus below, Henry Geller,[9] as a part of an overall study involving the FCC's informal rulemaking proceedings, became aware of a serious legal issue concerning such proceedings—namely the Commission's present pattern of applying so-called *Sangamon* restrictions.[10] Accordingly, in December, 1974, Mr. Geller filed a petition calling for revision of the Commission's procedures, and specifically pointed out that pending proceedings like the pay cable one (Docket No. 19554) came within *Sangamon*.[11]

The Commission ignored this and two other communications from Mr. Geller urging that *ex parte* presentations be barred in the pay cable proceeding. As a result, in the crucial final decisional period after the last oral argument, industry representatives engaged in extensive private lobbying with the Commission decision-makers. Thus, information submitted to the court of appeals—by no means complete—showed that "during this period broadcast interests met some 18 times with Commission personnel, cable interests

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[8] Cablecasting of Programs, Further Notice of Proposed Rule Making, 48 F.C.C. 2d 453 (1974).

[9] The amicus is now the counsel to Respondent NCCB.

[10] Sangamon Valley Television Corp. v. United States, 269 F.2d 221 (D.C. Cir. 1959) (hereafter, Sangamon). As developed more fully within, Sangamon proscribes *ex parte* presentations for "conflicting private claims to a valuable privilege" in a rule making proceeding. *Id.* at 224.

[11] Mr. Geller suggested an expedited process of three weeks to comment on *ex parte* presentations that had been made. FCC App. 92-93, nn. 105, 107.

some nine times, motion picture and sports interests five times each and public interest intervenors not at all." (FCC App. 95-96.) The lobbying was particularly intense during the final weeks.[12]

2. The FCC's 1975 Decision.

In its March 1975 Report and Order, the Commission compromised among the contending industries. It relaxed somewhat the restrictions on pay cable's use of film material but still maintained substantial restrictions. (FCC App. 171-179). In the sports area, the Commission tightened the restriction on carriage of specific sports events, and adopted a complex formula for dividing the market for non-specific sports events between commercial TV and pay cable. (FCC App. 179-187.) The Commission continued without change the rule banning advertising on pay programs and limiting pay operations to no more than 90% to be devoted to feature films and sports. (FCC App. 188.) The Commission first modified its rule prohibiting pay cable from showing series-type programming and then deleted it. (FCC App. 187-88, 225-27.)

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[12] Thus, on March 10, 1975, the trade journals stated that "word of last week's changes . . . got out during the week, and both broadcaster and cable lobbyists rushed to the Commission, unhappy with some facets" (*Television Digest*, March 10, 1975, p. 2)—that broadcast representatives ". . . were calling on commissioners on Friday . . ." to oppose the changes (*Broadcasting Magazine*, March 10, 1975, p. 6). The following week, the trade press again reported that "various [industry] groups lobbied the Commission, pressing for changes in the tentative decision" (*Television Digest*, March 17, 1975, p. 3)—that National Association of Broadcasters ". . . staff members met with [FCC] Broadcast Bureau staffers to present data backing up asserted need for [more restrictive] standard" (*Broadcasting Magazine*, March 17, 1975, p. 10). FCC App. 94-95.

3. The Court of Appeals Decision.

The Court of Appeals found, *inter alia*, that there was no need shown for the regulations, and that the rules are "grossly overbroad." (FCC App. 60-75, 88-91, 97). As such, the Court below also held that the rules violate the First Amendment. (FCC App. 88-91.)

The Court also stated, based on the undisputed presentations of the amicus and an FCC submission describing preliminarily the *ex parte* contacts made in the proceeding, that it was ". . . particularly concerned that the final shaping of the rules . . . may have been by compromise among the contending industry forces . . .", rather than by exercise of the Commission's independent public interest judgment. (FCC App. 96.) It held that the *ex parte* presentations violated the Commission's own rules, the principles laid down in *Sangamon, supra*, and this Court's decision in *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971). (FCC App. 96-106.) Judge MacKinnon filed a special concurring opinion joining only in the *Sangamon* ruling and differing with the majority's holding based on *Overton Park*. (FCC App. 117-122.) The Court remanded the record to the Commission "'to hold, with the aid of a specially appointed examiner, an evidential hearing to determine the nature and source of all *ex parte* pleas and other approaches that were made to' the Commission after the issuance of the Notice." (FCC App. 108.)[13]

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[13] Because the Court had found invalid the pay cable rules, the *ex parte* hearing is limited to the subscription TV (over-the-air pay) rules. FCC App. 107-08, 112, 246-49. But the Commission has moved to conform the two acts of rules. FCC Motion for Partial Stay of Mandate, filed April 18, 1977, at 9-10; FCC App. 248. If this Court denies certiorari or affirms the invalidity of the pay

REASONS FOR NOT GRANTING THE WRIT

On the merits, the crucial consideration is whether there is any need for these pay cable restrictions. On that issue, the Commission's position is a crumbling one, in almost total disarray. The Commission first modified its very restrictive 1970 rules, then abandoned its series rules, and now before this Court concedes that there is no basis for the film restrictions.[14] But as we show below, the sports rule is similarly lacking in record support, and is, if anything, even more arbitrary and patently protectionist of broadcasters than the now abandoned film rule. Significantly, the Commission lacks the support of the United States on the merits.

As to the procedural aspect, there are only three issues, each of which is dispositive of the case and none of which warrants further review by this Court: (i) whether the Commission followed its own rules; (ii) whether, on the facts here, the Commission violated the *Sangamon* principle; and (iii) whether, on the facts here, the Commission subverted the notice and comment requirements of the Administrative Procedure Act, 5 U.S.C. 553 (1970). The *Overton Park* issue, upon which the Commission so largely bases its petition, is a matter now in dispute before the Court of Appeals for the District of Columbia Circuit, and

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cable rules on any ground, the issue of the *ex parte* hearing becomes moot.

[14] Indeed, its Chairman has now acknowledged that even without the Court's reversal, the Commission would have removed the film restrictions. Statement of FCC Chairman Richard Wiley in Hearings Before the Senate Subcommittee on Communications, Senate Committee on Commerce, Science and Transportation, 95th Congress, 1st Session, on "Oversight of Cable TV" June 6, 1977, p. 26.

should be resolved first by that Court. See *Action for Children's Television* v. *FCC*, (D.C. Cir. Case No. 74-2006 (Slip Op. July 1, 1977)), *petition for rehearing filed July 15, 1977*. In any event, the reliance of the Court below on the *Overton Park* principle that the full administrative record must be before the reviewing court is sound, and requires no further review in the circumstances of this case.

I. The Court of Appeals Properly Found That The Commission's Pay Cable Rules Are Arbitrary And Grossly Overbroad.

The question as to availability of film to commercial television is *when*: Such film usually moves in sequence from theatres to pay TV to commercial TV. The Commission never established what public interest was involved in regulating this process of when film becomes available to commercial television. It sought to justify its rule largely on the so-called anti-siphoning ground—that pay cable must not be allowed to bid away films which would then become unavailable to the American people over commercial TV. Yet throughout these proceedings, the Commission has adopted irrational rules going far beyond any anti-siphoning purpose.

Thus, from 1970 to 1975, the Commission's rules were flagrantly protective of broadcasters. To give but one example, the Commission in 1975 admitted the obvious—that if a film has been sold to commercial TV, it is not siphoned (see FCC App. 173-174, ¶ 168), and therefore no Commission rule should bar its exhibition on pay TV. Yet for five years the Commission's rules did just that (*i.e.*, a film could not be shown on pay during the 2-10 year period after its general release, even if conventional TV were showing the same film a dozen times).

The Commission was strongly urged to discontinue this arbitrary protectionist policy, but while it modified the rules in 1975, it still employed many unnecessary restraints, solely to assist the commercial broadcasters. As the court below found, "examples of this are legion" (FCC App. 91).[15] The Commission has now conceded, because it has no answer to the patently arbitrary nature of its actions, in the film area.

[15] The following are just a few examples of the arbitrary nature of the Commission's film rule, set out at FCC App. 20-21:

> • A. Suppose a film were sold for theatre/cable exhibition for three years, and then sold to the network for exhibition to begin in the fifth year. Under the Commission's rule, the film could not be shown on pay in the fourth year, even though the film clearly has not been siphoned or unreasonably delayed in its conventional TV showing. The loss of this whole year of exhibition on pay is substantial, arbitrary, and a violation of the First Amendment as overbreadth. It markedly serves the broadcasters' private interest by eliminating any competition from pay during a substantial period for no valid reason, and by affording the broadcaster exclusivity (the fourth year in the above example) by Commission rule, rather than having to bargain and pay for it. See Home Box Office, 51 F.C.C. 2d 317, 318, 319 (1975).
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> • B. Suppose a film is sold to a network in its third year (after general release) for two showings over a two-year period; and then it is sold in syndication to a local station for five more showings over a three-year period. This film has not been "siphoned": It has been available to the local audience on conventional TV seven times in a five-year period. Yet for three more years—until the tenth year—the film could not be shown on pay.
>
> • C. Suppose a film is sold in the 3-10 year period for two years to a network for three prime time showings and then for five years to a local station for nine more showings (prime time, early show, late show). The film has now been available to the conventional TV audience 12 times over seven years. In the years 11-13 (since general release), the film is not available to pay under the Commission's rule (three years must pass since the last showing on commercial TV, and the film was shown in its 10th year). How can the Commission—concerned with anti-siphoning—justify a rule that precludes for a three-year period the pay cable showing of a film that has been available over commercial TV 12 times for the last seven years?

The Commission does seek review here of the sports rule, but significantly, it has not discussed in any detail the nature of the sports rule. For, upon analysis, that rule is shown to be as arbitrary and protectionist as its film counterpart. As a practical matter, the issue here is not the siphoning of major sporting event like the World Series or the Super Bowl,[16] but rather the treatment of non-specific events (*e.g.*, home or away baseball games). The 1975 rules provide that if less than 25 percent of the events in a sports category were broadcast live over commercial television in the market during the highwater mark season,[17] the number of events available for subscription exhibition will be the number of remaining games in highwater mark season. If, however, 25 percent or more of the events in a category were broadcast live over commercial tele-

[16] During hearings before the Subcommittee on Communications, Senate Commerce, Science and Transportation Committee, May 10, 1975 at 214-15, National Association of Broadcasters president Vincent Wasilewski testified that the NAB had no concern about the siphoning of national events, specifically citing the World Series and Super Bowl. In addition, sports entrepreneurs have asserted before the Commission and the Congress that they recognize the necessity to keep faith with the public by presenting these events on commercial TV; that as a practical matter, they are "locked in." See, *e.g.*, Testimony by Bowie Kuhn, Commissioner of Baseball, in Hearings before Subcommittee on Communications, Senate Commerce, Science and Transportation Committee on "Oversight of Cable TV," June 7, 1977 (Prepared Statement Appendix A, pp. 18-19.) Even assuming *arguendo* that they were to renege on these assurances, the effort to do so would be apparent years in advance of the actual occurrence, and Congress or the Commission could act to promptly preserve the status quo. *Cf.* Public Law 93-107 (the anti-blackout law, enacted in less than two months from initial hearings to signing). H. Rep. No. 483, 93d Cong., 1st Sess. (1973).

[17] The "highwater mark" season is that season among the preceding five seasons when the largest number of events in the relevant category were broadcast.

vision in the market during the highwater mark season, the number of events available for subscription exhibition is only 50 percent of the remainder games in the highwater mark season. (FCC App. 21-22, n. 8.)

The consequences of this arbitrary scheme are severe: If one assumes 80 away games in a baseball category, with 19 games on commercial television, pay could carry 61 games. But with 20 games (the 25 percent figure), pay would be cut to less than half the remaining 60 games, i.e., to 30 games. The other 30 games would be unavailable to the public. Commercial TV would not carry them because of a number of factors (*i.e.*, other popular fare; time or line problems associated with away games; the sports entrepreneur's judgment not to present too many home games or too many "free" TV games, etc.). Yet the public is denied the opportunity to see them on pay.[18]

NCCB submits that there is no more need for this Court to review whether the sports rule is arbitrary than to review the record basis of the film rule put before the Court by the broadcast petitioners. They both stem from the same protectionist mold, and reflect a compromise among the contending industry groups heavily weighted for the broadcasters and a "gloss-(ing) over (of) the more fundamental public interest." Cf. *National Association of Independent Television Producers and Distributers (NAITPD)* v. *FCC*, 502 F.2d 249, 257-58 (2d Cir. 1974).

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[18] Further, the events available for pay are to be reduced proportionally when the number of games conventionally televised is reduced from the previous season, even though, as the Court of Appeals correctly noted (FCC App. 91), "[T]his record reveals no reason to think that cutbacks represent siphoning any more than they represent editorial or commercial judgment."

II. The Court of Appeals Correctly Found That The Ex Parte Presentations Were Improper In this Case.

The Commission's procedures lent themselves to this compromise among the contending industries—to the patently arbitrary rules detailed above. For as the trade journals and the Commission's own submission reveals (Counterstatement, pp. 5-6), there was intense private lobbying by industry representatives during the final crucial decisional period. (FCC App. 94-96.) The Commission does not deny this. Rather, its position is one of demurrer—that any and all amounts of *ex parte* presentations in informal rulemakings under 5 U.S.C. § 553, even the flagrant pattern indicated here, are permissible. We submit that the court below correctly found such a pattern to be improper on a number of grounds, none of which warrant review by this Court.

A. The Commission Failed To Notify The Public That Ex Parte Contacts Were Permissible.

The procedure to be followed in this proceeding was specified in the Notice: It set forth the dates for filing comments and reply comments, and then employed the following phrase as the sole indication that *ex parte* contacts were permissible, "In reaching a decision in this matter, the Commission may take into account any other relevant information before it." (35 F.C.C. 2d at 899; FCC App. 101, n. 122). The Court of Appeals correctly held that this was too "cryptic" to meet the requirements of the Freedom of Information Act, 5 U.S.C. 552(a)(2)(B)(1970), that the public be given "an understanding of how an agency works" (FCC App. 101); and that the Commission accordingly violated its own rules, since absent the efficacy

of the above phrase, no additional comments or presentations were permissible. See *Sangamon Valley Television Corp.* v. *United States, supra,* 269 F.2d at 224-225; 47 CFR §1.415(d) (1975); but see *Action for Children's Television* v. *FCC, supra,* Slip. Op. 38, n. 31. Common sense indicates that only those versed in the arcane nature of the agency's processes would recognize the import of the cryptic phrase, and that many members of the public would remain wholly uninformed of the actual process.[19] In any event, this is not an issue warranting review by this Court.[20]

B. The Commission Clearly Violated the Sangamon Principle.

Sangamon, supra, was an informal rulemaking proceeding to allocate TV channels among several communities. When this Court learned that *ex parte* presentations had been made, it remanded the case to the Court of Appeals for a further hearing.[21] The Court of Appeals, agreeing with the Department of Justice,

[19] The Commission correctly states (FCC Pet. 43, n. 53) that public interest intervenors made some *ex parte* presentations but the number appears to be extremely low, particularly in comparison to the hundreds of such contacts by industry representatives. Thus, none of the Commissioners report *ex parte* presentations by public interest participants, with one exception—that of Mr. Geller (accompanied by two Rand Corporation employees) in September, 1974. But these same Commissioners indicate well over a hundred contacts by industry officials. See FCC submission to Court of Appeals, April 13, 1976.

[20] Significantly, the Commission, in a recent cable proceeding, has simply clarified the process by adding the phrase, "clearly, this is not a restricted proceeding." Economic Relationship Between Television Broadcasting and Cable Television, Notice of Inquiry, Docket No. 21284, 42 Fed. Reg. 32825, 32831, ¶ 26 (June 28, 1977).

[21] Sangamon Valley Television Corp. v. United States, 358 U.S. 49 (1958).

held that ". . . whatever the proceeding be called, it involved not only allocation of TV channels among communities but also resolution of conflicting private claims to a valuable privilege, and that basic fairness requires such a proceeding to be carried on in the open . . ."[22] That holding, the Court below stated ". . . so clearly governed the instant proceeding that there could be no question of the impropriety of *ex parte* contacts here." (FCC App. 102-103.)

The Commission does not argue that *Sangamon* is incorrect and should be reversed (FCC Pet. 37-41). Nor can it be seriously argued that *Sangamon* should be restricted to its own facts.[23] The Commission's arguments is that *Sangamon* should not be extended here because this proceeding is general in scope (FCC Pet. 40). But as the Court below unanimously held,[24] the pay cable proceeding, while an informal rulemaking

[22] Sangamon Valley Television Corp. v. United States, *supra,* 269 F. 2d at 224. Congress, in acting recently in this field, (Government in the Sunshine Act, 90 Stat. 1241 (1976)), specifically referred to the *Sangamon* principle with approval. See H. Rep. No. 94-800 Part II, 1975 U.S. Code, Cong. and Ad. News at 2228.

[23] For example, the *Sangamon* requirement would clearly have been applicable to the rulemaking proceeding determining color television standards. For that proceeding, while a rulemaking of general applicability, involved conflicting private claims to valuable privilege by two industry contenders, CBS and RCA. Peck, *Regulation and Control of Ex Parte Communications with Administrative Agencies,* 76 Harv. L. Rev. 233, 241 (1962).

[24] Accord: Action for Children's Television v. FCC, *supra,* Slip Op. 31-38. Unlike the *Overton Park* holding, discussed *infra,* there is no division within the circuit on the Sangamon issue, and it is therefore fully ripe for review by this Court. Nor is the Administrative Conference of the United States considering the Sangamon aspect of the *HBO* decision. N. L. Nathanson, "Report of the Special Committee on Ex Parte Communications In Informal Proceedings," June 24, 1977, at 1-2 (mimeographed).

of general applicability, involves conflicting private claims, pitting the cable/pay cable/film industries against the broadcast industry, for the valuable rights to exhibit film or sports over television.[25] There is, we submit, no need for this Court to review this crucial holding of the Court of Appeals.

C. The Ex Parte Activities Here Subverted The Basic Requirements Of The Administrative Procedure Act.

The requirements of the Administrative Procedure Act, 5 U.S.C. 553 (1970), for notice and opportunity to comment are not an invitation to a charade. They are clearly designed to initiate a genuine dialogue between the agency and the interested public. But in this case there was no meaningful dialogue because of the two-track nature of the process: public comments and oral argument, followed by a period of intensive *ex parte* presentations by industry representatives during the crucial decisional stage.[26] In these circumstances, the

[25] The Commission's reliance (Pet. 37-40) on Courtaulds, Inc. v. Dixon, 294 F. 2d 899 (D.C. Cir. 1961) is misplaced for the reasons stated by the Court below (FCC App. 103, n. 124). The FCC's reliance (Pet. 40) on Van Curler Broadcasting Corp. v. United States, 236 F. 2d 727 (D.C. Cir.), *cert. denied*, 352 U.S. 935 (1956), ignores the crucial consideration that unlike in *Van Curler*, the Commission here did consider the *ex parte* presentations in ". . . the action ultimately taken." *See* Action for Children's Television v. FCC, *supra*, Slip Op. 35-36.

[26] *See* Counter-Statement, *supra*, pp. 4-6 (FCC App. 95-96). Thus, Commissioner Robinson, who apparently kept records of all contacts, shows increased presentations in March, 1975, during the final crucial decisional period (i.e., March 4 (HBO); March 11 (NAB); March 14 (NBC)). Commissioner Hooks' report also reflects intensive industry lobbying during this period (i.e., March 11 (NCTA; NAB); March 14 (NBC); March 18 (Irving Kahn: Calif. Comm. TV Assn.)).

Court below correctly found that the Commission offers ". . . no facts at all that would tend to rebut the clear import of *amicus'* statements that *ex parte* contacts shaped the ultimate form of the pay cable rules . . ." (FCC App. 93, n. 107), and that the proceeding was accordingly vitiated. *Accord. Action for Children's Television* v. *FCC, supra,* Slip Op. 35-36, 38.

We are not suggesting that this would be so in the case of any *ex parte* presentation, at any stage, however minor or inconsequential. Rather, there is every indication that "compromises, fall-back positions and the so-called 'real facts' . . ."[27] were the subject of this intensive lobbying during the final crucial decisional stage.[28] Under *Portland Cement Assn.* v. *Ruckelshaus* 486 F.2d 375, 325-327 (D.C. Cir. 1973),[29] the public was entitled to know these important new arguments and to respond to them, since ". . . they may have materially

[27] This phrase is used by FCC Chairman Wiley in a 1974 speech deploring the "practice" of oral presentations continuing ". . . in the privacy of individual Commissioner and staff offices" after the oral argument in a rulemaking proceeding. (FCC App. 96-97, n. 117).

[28] *See* Counter-statement, pp. 5-6; FCC App. 96, where the Court below stated: "Our concern is heightened by the submission of the Commission's Broadcast Bureau to this court which states that in December 1974 broadcast representatives 'described the kind of pay cable regulation that, in their view, broadcasters "could live with."' "

[29] *See also* Ethyl Corp. v. EPA, 541 F. 2d 1, 48-53, 78, 85-86 (D.C. Cir. 1976); Mobil Oil Corp. v. FPC, 483 F.2d 1238, 1258-59 (D.C. Cir. 1973); International Harvester Co. v. Ruckelshaus, 478 F. 2d 615, 649 (D.C. Cir. 1973); Pedersen, *Formal Records and Informal Rulemaking*, 85 Yale L. J. 38, 75-78 (1975); Nathanson, *Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review Under the Administrative Procedure Act and Other Federal Statutes*, 75 Colum. L. Rev. 721, 762, 768 (1975).

influenced the action ultimately taken." *Action for Children's Television* v. *FCC, supra,* Slip Op. 35-36. Otherwise, the proceeding is simply a sham.

D. The Commission's Failure to Reduce These Ex Parte Contracts To Writing And Place Them In The Docket Violated The Overton Park Requirement That The Whole Record Be Before the Reviewing Court.

Because agencies are turning more often to informal rulemaking, the courts also are being called upon to review such agency actions and to lay down guiding principles.[30] In *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402, 416 (1971), this Court stated that in reviewing agency action to determine whether it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . .," (5 U.S.C. §706(2)(A)), the court is not to substitute its judgment for that of the agency, but its "inquiry into the facts is to be searching and careful . . ."; and that this inquiry is to be based upon "the 'whole record' compiled by the agency . . ." (*Overton Park, supra,* 401 U.S. at 419).[31]

The Court below correctly held that in this case, it did not have the "whole record" in light of the crucial *ex parte* presentations previously discussed, and accordingly also remanded for further proceedings to obtain the "full administrative record." *Citizens to*

[30] *See* FCC App. 56-60; Wright, *The Courts and The Rulemaking Process: The Limits of Judicial Review,* 59 Cornell L. Rev. 375 (1974).

[31] Indeed, because the Court did not have the "whole record," it remanded for further proceedings to obtain just such a record. *Id.* at 419-420.

Preserve Overton Park, Inc. v. *Volpe, supra,* 401 U.S. at 420. The Commission argues (FCC Pet. 32) that *Overton Park* is limited to its particular factual situation—"informal action pursuant to a specific statutory mandate"—and has no applicability to informal rulemaking proceedings. But the holding of *Overton Park* that review must be based on the "whole record compiled before the agency" is not based on a particular statute or special situation. Rather, this Court made clear that this is ". . . the basis for review required by Section 706 of the Administrative Procedure Act . . ." *Overton Park, supra,* 401 U.S. at 419.[32] *Overton Park* is not some sport; it sets forth the guiding principles for review of informal rulemaking actions.[33]

Following *Overton Park* or the decision below does not eliminate the "dichotomy" between informal rulemaking on the one hand and adjudication and formal rulemaking on the other (FCC Pet. 30). The genius of informal rulemaking is its flexibility, particularly that there need be no evidentiary hearing with cross-

[32] The Judicial Review Act of 1950, governing review of agency action coming under Section 402(a) of the Communications Act of 1934, as amended, 47 U.S.C. 402(a), similarly calls for the full record. *See* 28 U.S.C. 2342(1), 2347 (1970); Nathanson, op. cited n.29, at pp. 743-45. *See* also Rules 16 and 17 of the Federal Rules of Appellate Procedure, 389 U.S. 1087 (1968). Verkuil, Judicial Review of Informal Rulemaking, 60 Va. L. Rev. 185, 246 (1974) (". . . arbitrary and capricious review under the APA also requires a search of the whole record . . .").

[33] *See,* e.g., FCC App. 57; Camp v. Pitts, 411 U.S. 138, 142 (1973); Duquesne Light Co. v. EPA, 522 F.2d 1186, 1196 (3d Cir. 1975), *vacated on other grounds,* 427 U.S. 902 (1976); Chrysler Corp. v. Dept. of Transportation, 472 F.2d 659, 699-700 (6th Cir. 1972); City of Chicago v. FPC, 458 F.2d 731, 744 (D.C. Cir. 1971), *cert. denied,* 405 U.S. 1074 (1972); Pederson, *Formal Records and Informal Rulemaking,* 85 Yale L. J. 38, 47-49 (1975).

examination of witnesses. Neither *Overton Park* nor the decision below changes that. Similarly, the agency may continue to go outside the record and to rely on its own expertise. All that these cases require is that the agency spread on the record important facts or presentations upon which it relied in reaching its decision. That requirement stems not from considerations of "sunshine", desirable as they may be, but the basic requirements for court review. See Verkuil, *Judicial Review of Informal Rulemaking,* 60 Va. L. Rev. 185, 248 (1974) (". . . there still is room for agency expertise to roam. All that is required is for the agency to say where it has been [by including in the whole record important factual information relied upon by the agency in formulating the rule.]")

While we urge that the Court below is clearly correct in its reliance on *Overton Park,* there is a further consideration militating against review by this Court at this time. On July 1, 1977, the panel in *Action for Children's Television* v. *FCC, supra,* issued its opinion, differing with the *Home Box Office* panel as to the requirements of *Overton Park* (Slip Op. 36-37).[34] There is now a petition for rehearing, with a suggestion for *en banc* consideration, pending before the Court of Appeals. Whether or not that petition is granted, or the issue is clarified in some later case, as it must eventually be, we suggest that this Court does not sit to settle conflicts between panels of a single circuit court. This is especially so in a case where the decision as to which review is sought is clearly correct on a number of other

[34] The Action for Children's Television (ACT) panel pointedly disagreed with the holding in Home Box Office quoted at FCC Pet. 29 (*See* ATC, *supra,* Slip Op. 30-31).

independent grounds. See *Action for Children's Television* v. *FCC, supra,* Slip Op. 31-33, 36, 38.

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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July 23, 1977

APPENDIX

APPENDIX

Administrative Procedure Act. 5 U.S.C. § 553:

§ 553. RULE MAKING

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that no-

tice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

Supreme Court, U. S.
FILED
JUL 22 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976

Nos. 76-1724, 76-1841, 76-1842

FEDERAL COMMUNICATIONS COMMISSION,
AMERICAN BROADCASTING COMPANIES, INC., and
NATIONAL ASSOCIATION OF BROADCASTERS,

Petitioners,

v.

HOME BOX OFFICE, INC., et al.,

Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

JOINT BRIEF IN OPPOSITION FOR RESPONDENTS COLUMBIA PICTURES INDUSTRIES, INC., MCA INC., METRO-GOLDWYN-MAYER INC., PARAMOUNT PICTURES CORPORATION, TWENTIETH CENTURY-FOX FILM CORPORATION, UNITED ARTISTS CORPORATION, WARNER BROS. INC. and MOTION PICTURE ASSOCIATION OF AMERICA, INC.

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IN THE

Supreme Court of the United States

October Term, 1976

Nos. 76-1724, 76-1841, 76-1842

FEDERAL COMMUNICATIONS COMMISSION, AMERICAN BROADCASTING COMPANIES, INC., and NATIONAL ASSOCIATION OF BROADCASTERS,

Petitioners,

v.

HOME BOX OFFICE, INC., et al.,

Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

JOINT BRIEF IN OPPOSITION

This joint brief is submitted by respondent motion picture companies[1] and respondent Motion Picture

---

[1]Columbia Pictures Industries, Inc., MCA Inc., Paramount Pictures Corporation, Twentieth Century-Fox Film Corporation and Warner Bros. Inc. brought the petition for review in Case No. 75-1430 below. Metro-Goldwyn-Mayer Inc. and United Artists Corporation brought the petition for review in Case No. 75-1496 below.

Association of America, Inc.,[2] in opposition to the petitions for writs of certiorari filed by the Federal Communications Commission ("Commission"), the American Broadcasting Companies, Inc. ("ABC"), and the National Association of Broadcasters ("NAB") to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on March 25, 1977.

OPINIONS BELOW

The opinion of the court of appeals has not yet been officially reported. The *First Report and Order* of the Commission in Dockets 19554 and 18893 is reported at 52 FCC2d 1 (1975); the *Memorandum Opinion and Order* on reconsideration thereof is reported at 54 FCC2d 797 (1975); and the *Second Report and Order* in Docket 19554 is reported at 35 Rad. Reg. (P&F)2d 767 (1975).

The full texts of the opinions below are printed in Appendices A-F to the petition for a writ of certiorari filed by the Commission (No. 76-1724). For convenience, reference herein will be to the Commission's Appendices ("FCC App. ——").

JURISDICTION

The judgment of the court of appeals was entered on March 25, 1977 (FCC App. G, pp. 243-246). A partial stay of mandate, which did not include the feature film rule (47 C.F.R. §76.225(a)), was granted by the court of appeals on

[2]Case No. 75-1555 below.

May 4, 1977 (FCC App. H, pp. 247-250). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the ABC and NAB petitions present any important public interest issue justifying further review of limitations imposed by a Commission rule on pay cable showings of feature films when the Commission has now abandoned the rule and no longer defends it in this Court.

2. Whether the court of appeals correctly set aside the feature film rule as imposing arbitrary, unlawful and unconstitutional restraints on the right of the viewing public to see movies in their homes uninterrupted by commercial advertising, uncut to fit commercial television time slots, unedited to satisfy the tastes and mores of the network censor, and at a fraction of box-office prices.

REASONS FOR DENYING THE WRIT

In its *First Report and Order, supra* (FCC App. C, pp. 123-204), the Commission adopted rules sharply limiting subscription services[3] from showing feature films and

[3]The Commission uses the term "subscription services" to refer to both subscription television ("pay television") and subscription cablecasting ("pay cable"). Pay television involves the over-the-air broadcasting of a scrambled television signal which, on payment of a fee, may be unscrambled and viewed on home receivers by subscribers. Pay cable involves the closed circuit distribution by wire of nonbroadcast programming for which the cable television system subscriber is charged an additional program or channel fee beyond the regular monthly fee for the system's television signal reception service.

series-type programs to the viewing public. The feature film rules were complex (FCC App. C, pp. 171-179, 191, 192-93). Pay cable could offer feature films:

> –Without restriction *only* for a three-year period following their general release in theatres (a wholly arbitrary limitation, since the most popular films remain in theatrical exhibition the longest and would, therefore, get a shorter and insufficient pay cable run, or possibly no pay cable run at all).
>
> –During the 3-10 year period after theatrical release, *only* if the films were under license and available for commercial television broadcast (an illusory rule, because network and local stations normally insist upon and obtain contractual exclusivity against pay cable during the broadcast availability period).
>
> –More than 10 years after theatrical release, *only* if the films were not telecast for the prior three years and, therefore, according to the Commission were "undesirable" (an irrational rule that penalized the producer who licensed his film to commercial television).

The series rule was even more restrictive than the feature film rule. Only those series, no episode of which was ever broadcast on commercial television, could be shown on pay cable or pay television (FCC App. C, pp. 187-88, 192, 194).

Following the filing of petitions for review in the court of appeals, however, the Commission repealed the series rule (FCC App. E, pp. 219-234). Now, following the decision of the court of appeals setting aside all the pay cable rules,

the Commission has announced it will no longer defend the pay cable feature film rule, 47 C.F.R. § 76.225(a). Its petition for a writ of certiorari is limited to the other pay cable rules set aside by the court below, 47 C.F.R. §§76.225(b)-(d). These other rules pertain to the pay cable showing of sports events and the ancillary limitations providing that no more than 90% of the total pay programming hours may be devoted to feature films and sports events, and banning commercial advertising announcements.

However, ABC, one of the three networks, and NAB, representing the interests of the broadcast industry, seek further review and retention of the pay cable feature film rule, as well as the other pay cable rules set aside by the court below. They represent a dwindling broadcast group in favor of the rules.[4] By contrast, the Department of Justice, the President's Office of Telecommunications Policy and numerous public interest groups[5] all argued against the rules. Indeed, the United States, a statutory respondent in the court below (28 U.S.C. §2344), vigorously opposed the Commission and argued that the feature film rule–and all the pay cable rules–should be set aside. Even the Commission, finally and

---

[4] Significantly, the two other networks, CBS and NBC, who were petitioners below, do not seek further review in this Court. Further, Metromedia, Inc., a large group owner of television stations and also a petitioner below, which focused its argument on the need for the feature film rule, does not seek further review.

[5] American Civil Liberties Union, Aspen Institute for Humanistic Studies, National Urban League, National Black Media Coalition, Authors League of America, United States Conference of Mayors, Kennedy Center, Lincoln Center, Metropolitan Opera, Action for Children's Television.

belatedly, has now agreed that the feature film rule should be abandoned.

Under these circumstances, respondents sumbit that the petitions of ABC and NAB seeking review of the pay cable feature film rule—a rule no longer defended by the agency that adopted it—do not present any public interest issue or important question of law warranting further review in this Court. Further, respondents submit that the decision below, setting aside the pay cable rules in their entirety, is plainly correct. Indeed, several of the grounds on which the court below relied in invalidating the pay cable rules, namely that the rules are grossly overbroad and that the Commission failed to consider adequately their anticompetitive effect,[6] are not even challenged by either the Commission, ABC or NAB. Whether taken singly or in combination, the many substantive and procedural bases which the court below gave for setting aside the pay cable feature film rule—and all the pay cable rules—as "arbitrary, capricious and unauthorized by law" (FCC App. A, p. 20) constitute strong and compelling reasons for invalidating the rules and denying further review in this Court.

I

The posture of this case as it relates to the Commission's rules—now repealed or abandoned—affecting the showing of feature films or series-type programs demonstrates that no important questions of law are presented warranting further review in this Court.

---

[6]FCC App. A, pp. 60-75, 88-91, 97.

(A) The restriction on showing series-type programs (FCC App. C, p. 192, §73.643(c); p. 194, §76.225(c)) was repealed by the Commission (FCC App. E, pp. 219-234) after petitions for review were filed in the court of appeals[7] and is not challenged in this Court by any party.

(B) The rules restricting the showing of feature films by pay cable systems were set aside by the court below on March 25, 1977 (FCC App. A, p. 112). Thereafter, on April 15, 1977, the Commission issued a public notice stating that it would seek further review in this Court "of all aspects of the Court's opinion *with the exception of that part striking down the restrictions on movies*" (FCC Mimeo 80909) (emphasis supplied). The Commission's decision to abandon its defense of the feature film rule was communicated to the court below on April 18, 1977, in its motion for a partial stay of mandate (FCC App. H, p. 247). Its petition for a writ of certiorari in this Court, although not a model of clarity in delimiting those aspects of the decision below for which it seeks further review, also makes the same representation to this Court in two footnotes:

---

[7]FCC App. A, p. 112. The court below made clear that if the restrictions on series type of programs had not been rescinded by the Commission, the court would have invalidated the series rule (FCC App. A, p. 74):

> "We agree with petitioners that the series rule would have restricted the market for independently produced entertainment programming, thereby creating an effect directly contrary to that sought to be achieved in the Prime Time Access Rules proceedings. As a result, the series rules could not have been sustained on the record before us." (Footnote omitted.)

> "Because the Commission is not arguing before this Court for the retention of the feature film siphoning rules as modified, the discussion above will be confined to the details of the modified sports rules." (FCC Pet. p. 7, n. 5);
>
> ". . . review is not being sought of the [court's] action with respect to subsection (a) of the rules . . ." (FCC Pet. p. 8, n. 10).

Further, the Commission's Chairman, Richard Wiley, recently testified before the Senate Subcommittee on Communications that the feature film rules were not "necessary." He added:

> "I believe the Commission might well have arrived at the same conclusion about the film rules, even without the *Home Box Office* case, but could not act so long as the case remained undecided."[8]

Thus, based on the Chairman's statement, even if the feature film rules had been upheld by the court of appeals, they would have been reconsidered and set aside by the Commission itself. Under such circumstances, it would be patently wasteful of the time and energies of this Court and serve no useful purpose to grant further review of the feature film rule.[9]

---

[8]Statement of Richard E. Wiley, FCC Chairman, at Hearings Before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation. June 6, 1977, at 26.

[9]ABC argues that the Commission offered no explanation for its reversal of position on the feature film rule and that its decision not to seek further review of that rule in this Court is therefore arbitrary (ABC Pet. pp. 4-5). We are unaware of any case requiring an agency to offer an additional explanation for accepting a decision by a court of appeals setting aside agency rules as "arbitrary, capricious, and unauthorized by law in all other respects" (FCC App. A, p. 20).

(C) The rule restricting the showing of feature films by pay television stations, as distinguished from pay cable systems, was affirmed by the court below subject to the further proceedings ordered to determine the impact of *ex parte* contacts (FCC App. A, p. 112). The Commission, however, determined that "there is [no] proper justification for applying more stringent anti-siphoning regulations to pay television than are being applied to pay cable" (FCC Mimeo 80909, April 18, 1977). Therefore, it asked the court below to remand the pay television feature film rule to the Commission "so that it could be revoked" (FCC App. H, p. 247). The court below granted the Commission's request (FCC App. H, p. 248) and, on June 22, 1977, the Commission adopted a *Notice of Proposed Rule Making* in Docket No. 21311, 42 Fed. Reg. 34341 (July 5, 1977), proposing the deletion of Section 73.643(a) of its subscription television rules, 47 C.F.R. §73.643(a). Thus, the pay television equivalent of the pay cable feature film rule is in the process of being set aside by the Commission and is not before this Court for further review.

In short, either as to pay cable or pay television, no important public interest issue or question of law is presented warranting further review of the feature film rule. The pay cable feature film rule has been abandoned by the Commission and the Commission's Chairman has testified before Congress that the purported marketplace justification for the rule does not exist. The pay television feature film rule is not before this Court for further review. Under such circumstances, there is no real controversy before this Court, only the bare claims of two remaining broadcaster parties trying to revive the pay cable feature film rule. Respondents submit that the ABC and NAB petitions, to the extent they seek further review of the pay cable feature film rule, 47 C.F.R. §76.225(a), should be denied.

II

The issue presented by this case with respect to feature films was whether the Commission could validly impose restraints on the right of the viewing public to see movies in their homes that are uninterrupted by commercial advertising, uncut to fit commercial television time slots, unedited to satisfy the tastes and mores of the network censor, and at a fraction of box-office prices. The decision below holding that such restraints were arbitrary, unlawful and unconstitutional is plainly correct.

This case does not involve any of the grounds upon which the Commission and the courts have traditionally relied when justifying protection of commerical television against new forms of competition:

> There was no prediction of economic damage to the television networks, let alone economic damage which would impair their ability to serve the public interest.
>
> There was no prediction of economic damage to television stations, let alone economic damage which would impair their ability to serve the public interest.
>
> There was no prediction of any impact upon the Commission's allocation scheme, which is designed to bring a choice of television service to a maximum number of communities.

See FCC App. A, pp. 44, 56, 70. Instead, there was only the prediction, unsupported by any facts, that at some unspecified future date, the showing of theatrical movies on commercial television might be decreased or delayed by reason of the growth of pay cable.

Motion pictures that are made initially for theatres are a form of programming that was not even accepted by the

networks until 1961. Today, by the networks' own choice, theatrical movies are a small and declining portion of the network schedules.[10] But whether the networks use more movies or fewer movies, older movies or newer movies, is hardly a subject for federal intervention. The Commission does not dispute that it is powerless to require or prohibit the showing on commercial television of any motion pictures at all (FCC App. A, p. 50). How, then, may it validly bar or restrain pay cable from providing the public with the opportunity to view them when the networks have the unilateral and unregulated power to decide when—and indeed whether—such motion pictures will be broadcast to the public?[11]

Over the years, the Commission and the opponents of pay television and pay cable have utilized the label of "siphoning" to suggest that commercial television may be completely deprived of movies if pay use of such films is not artificially restricted. The metaphor cannot be affixed to motion pictures which, unlike other forms of entertainment, live indefinitely and after having been shown on pay cable will move to commercial television. Thus, the only question is

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[10] Made-for-television movies are now a majority of the prime time movies shown on television. The availability of these movies cannot be decreased or delayed by pay cable competition, since they are made directly for showing by the networks or local stations and are under their control (FCC App. A, p. 51).

[11] The Commission has never subjected a license renewal application to any scrutiny for the licensee's failure to show feature films and certainly not for its failure to show feature films of a particular age. Indeed, when the networks reduced the number of "movie nights" in the prime time viewing hours from 9 to 5, this "self-siphoning" of feature films by the networks evoked absolutely no response from the Commission.

when they will be available to commercial television, not *whether*. Indeed, the court below correctly determined that the Commission and other proponents of the rules had virtually abandoned the "siphoning" label and relied instead on the claimed possibility of *"delay"* in the availability of motion pictures (FCC App. A, p. 36, n. 38).

Reliance on the "delay" theory, however, to support the regulatory restraints on pay cable fails on all counts:

> There was no showing or finding by the Commission that significant delay would in fact occur.
>
> There was no showing or finding by the Commission that a delay in the showing of feature films would impair their entertainment value.
>
> There was no finding that a possible delay in the presentation of feature films is a matter affecting the public interest or affecting it to a degree which would justify the rules adopted.

See FCC App. A, pp. 60-66, 67, 81.

The fact is that delay has never been a factor in determining the popularity or commercial success of motion pictures on commercial television.[12] The court below was

---

[12]The examples are legion in which the most popular films have *not* been presented on commercial television as "fresh" product immediately following theatrical release. Such famous films as "Bridge on the River Kwai," "Lawrence of Arabia,' and "Around the World in Eighty Days," were first presented on commercial television 8, 10 and 15 years, respectively, following general theatrical release. "Sound of Music" was shown on commercial television for the first time on February 29, 1976. Although this was ten years after first general theatrical release, "Sound of Music" attracted a national audience of 58 million viewers. More recently, "Gone With the Wind" was shown on commercial television on November 7 and 8, 1976, thirty-seven years after first theatrical relaeas. Nevertheless, it attracted a national audience of 110 million viewers.

right, therefore, in determining that the record was completely barren of any evidence, findings, or reasoned explanation to support the feature film rule. This was particularly true in light of the First Amendment restrictions on any governmental limitations of free speech, the patent anticompetitive nature of the invalidated regulations, and the procedural irregularities in the Commission's decision.[13] Indeed, petitioners do not even challenge the determination by the court below that the rules are "grossly overbroad" and that the Commission failed to consider adequately the anticompetitive effects of the rules, two separate and independent reasons for denying certiorari. In short, the decision below setting aside the pay cable rules in their entirety is plainly correct and further review in this Court should be refused.

---

[13]The court below held that *ex parte* contacts took place between the Commission and private industry representatives which influenced the final outcome and were impermissible since they involved "conflicting claims to a valuable privilege." *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221 (D.C. Cir. 1959). While there was a disagreement among the panel on the scope of the *ex parte* ruling (see Judge MacKinnon's special concurring opinion, FCC App. B, pp. 117-122), all three members of the court agreed that the Commission's actions here were improper. Another panel of the District of Columbia Circuit, in a more recent opinion, *Action for Children's Television v. FCC*, No. 74-2006, decided July 1, 1977, has determined that in its view the special concurring opinion of Judge MacKinnon in the case below sets forth the appropriate standard. But the second panel also agrees that this case was correctly decided. *Id.*, at 31, 36-37. In any event, the District of Columbia Circuit has been asked to reexamine the entire question and further review of the appropriate standard of conduct would be premature at this time.

CONCLUSION

For the foregoing reasons, respondents respectfully submit that the petitions for writs of certiorari filed by the Commission, ABC and NAB should be denied. If this Court, however, should decide to grant review of any of the discrete issues posed by the Commission, respondents urge the Court to clearly limit the issues on which review is granted, and make plain that the ABC and NAB petitions are denied with respect to the feature film rule, 47 C.F.R. §76.225(a).

Respectfully submitted,

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No. 76-1724

In the Supreme Court of the United States

OCTOBER TERM, 1977

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

HOME BOX OFFICE, INC., ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR REHEARING

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76–1724

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

HOME BOX OFFICE, INC., ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR REHEARING

The Federal Communications Commission respectfully moves this Court for an order vacating its denial of the above referenced petition for a writ of certiorari and granting that petition. As grounds for this request, the Commission states the following.

The Commission's petition for certiorari was filed on June 4, 1977. On July 1, 1977, before any oppositions to that petition were tendered, the court below released an opinion in *Action for Children's Television* v. *FCC (ACT)*, No. 74–2006, which contained language differing in some but not all respects with its opinion in the instant case on the matter of *ex parte* communications. In order not to burden the Court, the Commission decided to wait until all oppositions to its petition were in before filing any further pleadings, and eventually four such

oppositions were submitted, each of which discussed, *inter alia*, the impact of the *ACT* decision.[1] However, the last of these responses, that of the United States, was not filed until September 23, 1977, the last business day before the opening of the Court's term. When, on September 28, 1977, the Commission tendered its reply comments, its counsel were informed that the Court had already conferred on the case—and on October 3, 1977, the Commission learned that its petition had been denied.

The Commission is well aware that under the Court's rules a petition for certiorari may be acted upon as soon as the time for responsive pleadings has expired. But for the delay in filing by the United States, however, the Court would have had the Commission's reply in hand well before the opening of the current term. Moreover, the decision of the court below in *ACT* was an important intervening matter as to which this Court has not yet had the benefit of the Commission's views.[2] In light of these circumstances, the Commission believes that the Court might wish, even now, to reconsider its refusal to hear this case. Accordingly, the Commission has submitted the instant petition.

* * * * *

It is significant that no opponent of certiorari supported the holding of the court below that *ex parte* contacts should be totally barred in informal rulemaking.[3] Instead, all four argued

[1] The four opponents were Home Box Office, *et al.* (HBO), Columbia Pictures Industries *et al.* (Columbia), the National Citizens Committee for Broadcasting (NCCB), and the United States of America (United States).

[2] Although the Commission did file its reply comments on September 28, 1977, it is counsel's understanding that these were never considered by the Court.

[3] NCCB contended that the *ex parte* contacts here should have been reduced to writing because of the requirements that the public be able to comment on proposed rules and that judicial review be based on the "whole record" compiled by the agency. NCCB Opp. at 16–20. But the holding of the court below clearly went further than that, and in any case both it and NCCB's more limited argument are untenable. The purpose of informal rule-

that this Court should deny certiorari because of the alleged conflict over this holding within the District of Columbia Circuit. *Compare* the opinion below with that in *ACT*, *supra*. The United States even went so far as to claim that the rule of *HBO* "does not appear to be the law of the circuit," because, in *ACT*, *supra*, "the court of appeals *held*" that *ex parte* contacts were not prohibited in rulemakings that did not involve competing claims to a valuable privilege. U.S. Opp. at 20. [Emphasis supplied.] This contention ignores the unequivocal statement of the *ACT* panel that, notwithstanding its view that the rule of *HBO* should not apply to every case of informal rulemaking, "*we hold only* that *Home Box Office's* broad proscription is not to be applied retroactively in the case *sub judice* * * *." *ACT*, *supra*, slip op. at 31. [Emphasis supplied.]

Moreover, even in light of the *dictum* in the *ACT* opinion, this Court should still review the instant case, for that *dictum* too is in error. It is true that the panel in *ACT* opposed the complete prohibition of *ex parte* contacts in informal rule-

making proceedings is to educate the agency, not to provide an adversary forum. Here, the Commission permitted two rounds of written comments and replies, along with two oral arguments and an unlimited opportunity for off-the-record contact. This was more than adequate to give the public a chance to express its views, and in fact no one has ever alleged that the Commission based its pay TV rules on anything as to which there was not a fair opportunity for comment. Accordingly, there was no element of "sham" in this proceeding. As for the requirements of judicial review, the court below had before it three Commission orders, which contained all the significant factual information and policy considerations which the agency believed would support its result. If these were lawful and reasonable, that should have been enough to satisfy the court below; if they were not, the court was free to reverse the agency. *See* Nathanson, Report to the Select Committee [of the Administrative Conference of the United States] on ***Ex Parte*** Communications in Informal Rulemaking Proceedings, p. 21. (This report, which contains a general critique of the opinion below and that in *ACT*, *supra*, concludes at p. 31 that "the extent to which *ex parte* communications might interfere with the adequacy of judicial revew or the fairness of the administrative hearing is not sufficient to justify an absolute ban upon *ex parte* communications in Section 553 rulemaking proceedings.")

making, and the Commission believes that it did so persuasively.[4] But the *ACT* panel agreed with the *HBO* panel that the *ex parte* contacts in this case were improper: (1) because they occurred in a proceeding involving "conflicting claims to a valuable privilege";[5] and (2) because they "may have influenced the action ultimately taken."[6] *ACT, supra,* slip op. at

[4] The *ACT* opinion contains a compelling analysis of the flexible nature of informal rulemaking proceedings and the agency's role therein. Slip op. at 20–28. In addition, it: (1) demonstrates the total lack of support for the opinion below in either the Administrative Procedure Act or the Government in the Sunshine Act, *id.* at 31–32 and n. 28; (2) corrects the misreading by the court below of the *Courtaulds* precedent, *id.* at 33–34 and n. 29; (3) illuminates the deficiencies in the *HBO* majority's *Overton Park* argument, *id.* at 36–37; and (4) challenges the conclusion in *HBO* that the Commission's reception of *ex parte* communications violated its own rules, *id.* at 38 n. 31.

[5] Like the two panels of the court below, all four opponents of certiorari stated that this case should be governed by the *Sangamon* precedent. *Sangamon Valley Television Corp.* v. *FCC,* 269 F. 2d 221 (D.C. Cir. 1959). But neither the court below nor any opponent offered any support for this conclusion beyond the bare assertion that both proceedings were rulemakings and involved conflicting economic interests. This simplistic comparison ignores the vast difference between a *de jacto* adjudication, such as that in *Sangamon,* and a genuine rulemaking of general applicability. NCCB's analogy to the color TV proceeding (NCCB Opp. at 15) only heightens this distinction. There, only two contenders, CBS and RCA, were involved; here, dozens participated and many more were affected in varying degrees. Moreover, if there really were a need to bar *ex parte* contacts in general rulemakings, this need would surely be no less where "the public" was on one side of a controversy and "the industry" on the other (as in *ACT*) than where there were competing industries espousing almost every conceivable point of view (as in *HBO*). Thus, it would appear that the *ACT* panel has drawn the line (see slip op. at 36–37) at exactly the wrong place.

[6] Much has been made of the charge that *ex parte* contacts may have helped shape the pay TV rules, but the Commission cannot agree that this was necessarily a bad thing. On the contrary, experience shows that to forbid all off-the-record communication during rulemaking would inhibit the free exchange of views which is particularly critical in connection with

36–38. Thus, in the Commission's view, both panels of the D.C. Circuit are wrong as to the proper conduct of an informal rulemaking of the type exemplified by this case.

Finally, it should be noted that the D.C. Circuit has refused to resolve the differences it does have on the *ex parte* question, for on August 24, 1977, it denied rehearing and rehearing *en banc* in *ACT*. As a result, even before this Court's action, the Commission was at a loss to know what to do in future proceedings. Denial of certiorari has only compounded the agency's dilemma. The United States has advised the Commission that, even in a new rulemaking on pay cable, the opinion below might be considered as "simply * * * an appellate precedent to be considered * * * with other authorities * * *." U.S. Opp. at 20. In addition, the United States has suggested that this matter should remain undecided until an "appropriate record" appears in the D.C. Circuit. *Id.* The Commission believes, however, that it should not be forced to run the risk of having another set of rules invalidated in order to find out what the law is in this important area.[7]

The instant case is fully ripe for review. For the reasons stated above, as well as those contained in the petition for writ of certiorari, the Commission respectfully requests that this Court

matters of policy, and would also impose unnecessary burdens on the agency. *See* Nathanson, *supra,* at p. 23 and notes 18 and 21. For example, the *HBO* opinion (and also the *ACT* opinion, so far as it extends) would prohibit Commission staff members from telephoning private practitioners to obtain clarification of points made in their briefs—thus increasing the possibility of the agency's acting on the basis of imperfect knowledge. Similarly, both opinions would ban attendance at meetings or conventions at which issues involved in pending rulemakings might be discussed. Given the number of rulemaking proceedings and their duration and scope, this could effectively isolate the Commission for years at a time, not only from the industries it is supposed to regulate, but also from the public it is supposed to serve.

[7] Even a remand would not be appropriate here because, as demonstrated above, the D.C. Circuit is in apparent agreement as to the ultimate result of this case, even though it is divided as to rationale. *Cf. Wisniewski* v. *United States,* 353 U.S. 901 (1957). Thus, only full Supreme Court review can alleviate the conditions under which the Commission must now operate.

grant rehearing of its order denying certiorari, vacate that order, grant the Commission's petition and review the judgment and opinion below.

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October 25, 1977.

CERTIFICATE OF COUNSEL

I, Daniel M. Armstrong, hereby certify that this "Petition for Rehearing" is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

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